

(21,137.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 139.

SHEVLIN-CARPENTER COMPANY AND JOHN F. IRWIN,
PLAINTIFFS IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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a In the Supreme Court of the United States.

SHEVLIN-CARPENTER COMPANY, a Corporation; and JOHN F. IRWIN,
Plaintiffs in Error,

VS.

THE STATE OF MINNESOTA, Defendant in Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the Honorable the Judges of
the Supreme Court of the State of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition
of the judgment of a plea which is in the said supreme court of the
State of Minnesota, before you or some of you, being the highest
court of law or equity of the said State in which a decision could be
had in the said suit between the Shevlin-Carpenter Company, a cor-
poration, and John F. Irwin, respondents and plaintiffs in error,
and The State of Minnesota, plaintiff and defendant in error,
wherein was drawn into question the validity of a statute of and an
authority exercised under said State, on the ground of their being
repugnant to the Constitution of the United States, and the decision
was in favor of such their validity, and wherein was drawn in ques-
tion the construction of a clause of the Constitution of the United
States and the decision was against the right, title, privilege, and
exemption specially set up and claimed under such clause of the said
Constitution, a manifest error hath happened, to the great damage
of the said Shevlin-Carpenter Company and John F. Irwin, plaintiffs
in error, as by their complaint appears, we being willing that error,
if any hath been, should be duly corrected and full and speedy jus-
tice done to the parties aforesaid in this behalf, do command you,
if judgment be therein given, that then, under your seal, distinctly
and openly, you send the record and proceedings aforesaid, with all
things concerning the same, to the Supreme Court of the

b United States, together with this writ, so that you may have
the same at Washington on the 6th day of May next, in the
said Supreme Court to be then and there held, that, the record and
proceedings aforesaid being inspected, the said Supreme Court may
cause further to be done therein to correct that error what of right
and according to the laws and customs of the United States should
be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme
Court of the United States, the 6th day of April, A. D. 1908.

HENRY D. LANG,
*Clerk of the United States Circuit Court
for the District of Minnesota.*

Allowed by
CHARLES M. START,
*Chief Justice of the Supreme Court
of the State of Minnesota.*

[Seal U. S. Circuit Court, Third Division, Dist. of Minnesota.]

c (Endorsed:) Original. No. —. U. S. Supreme Court, Shevlin-Carpenter Co. et al., Plaintiffs, vs. State of Minnesota. Defendant. Writ. Clapp & Macartney. A. Y. Merrill and R. J. Powell, Lumber Exchange, Minneapolis, Minnesota, Attorneys for Pl'ffs.

d STATE OF MINNESOTA,
In Supreme Court:

THE STATE OF MINNESOTA, Respondent,
v.
SHEVLIN-CARPENTER COMPANY, a Corporation; and JOHN F. IRWIN,
Appellants.

The petition of Shevlin-Carpenter Company and John F. Irwin the defendants and appellants in the above entitled cause, respectfully shows unto Your Honor:

1. That the said cause is an action commenced by the plaintiff above named against your petitioners to recover for a trespass alleged to have been committed by your petitioners upon lands belonging to the state of Minnesota, and the cutting and removing of certain timber from said lands. That the said cause is based upon and can only be maintained in its present form, under and pursuant to the provisions of Section 7 of Chapter 163 of the General Laws of the state of Minnesota for the year 1895.

That the said cause was commenced in the District Court, state of Minnesota, for the county of St. Louis, and that in due time, and pursuant to the provisions of the practice code of the state of Minnesota, your petitioners demurred to said complaint, and that in support of their said demurrer your petitioners claimed that the provisions of said Section 7 of Chapter 163 of the General Laws of 1895, were, and are, in violation and contravention of that portion of the Fourteenth Amendment to the Constitution of the United States,

e wherein it is enacted and declared that no state shall deprive any person of life, liberty or property without due process of law; and that your petitioners also claimed that the said provisions of said section 7 are also in violation and in contravention of natural justice, and because they invade the natural rights of man which are protected by the fundamental principles of the social compact. That the said District Court of the state of Minnesota, upon the trial of the issues of law raised by said demurrer, decided and gave judgment against the aforesaid claims of your petitioners and that upon an appeal to the Supreme Court of the State of Minnesota, and in said court, upon said appeal, your petitioners renewed their said claims as to the unconstitutionality and invalidity of said Section 7 of Chapter 163 of the Laws of 1895 as hereinbefore set forth. That the said Supreme Court of the state of Minnesota, upon the trial of said appeal, affirmed the order and judgment of the said District Court, and thereby decided and gave judgment against your petitioners and against the rights and claims so as aforesaid made by your petitioners in said Supreme Court.

That thereafter the said cause was remanded to said District Court for further proceedings according to law, and your petitioners duly filed and served their answer to the complaint herein, wherein your petitioners again asserted and made their said claims as to the invalidity and unconstitutionality of said law. That the said District Court, notwithstanding, and against the aforesaid claims of your petitioners, gave judgment against your petitioners in said cause for the sum of \$27,533.07. That your petitioners appealed from said judgment so rendered to said Supreme Court of the state of Minnesota, and upon said appeal and the hearing thereof in said Supreme Court, your petitioners again made and asserted their aforesaid claims as to the unconstitutionality and invalidity of said law, as hereinbefore set forth.

f But that on the 14th day of February A. D. 1908, the said Supreme Court of the state of Minnesota rendered a final judgment in said cause affirming the judgment of said District Court; that the said Supreme Court was, and is, the tribunal having jurisdiction under the laws of the state of Minnesota, to render final judgment in all proceedings and actions of the nature of the above entitled cause, and that the said judgment is the final judgment in said cause in favor of the state of Minnesota and against your petitioners.

That the final judgment of the Supreme Court of the state of Minnesota was against each and all the rights so claimed by your petitioners in said matter, all of which will more fully appear by the record in said proceeding now remaining in said Supreme Court.

Wherefore for as much as your petitioners believe that there was manifest error in said decision of said court against the several claims of your petitioners, as hereinbefore set forth, and in the final judgment in said action or proceeding which is to the great damage of your petitioners, your petitioners pray that Your Honor will examine the records of said Supreme Court of the state of Minnesota in this behalf, and allow your petitioners a writ of error to the end that said judgment and record may be brought before the Supreme Court of the United States agreeably to the laws of the United States in that behalf enacted.

Dated February 15, A. D. 1908.

(Signed)

SHEVLIN-CARPENTER
COMPANY, AND
JOHN F. IRWIN,
By A. Y. MERRILL,
CLAPP & MACARTNEY,
Attorneys for Petitioners.

A. Y. MERRILL,
CLAPP & MACARTNEY,
Attorneys for Petitioners.

g STATE OF MINNESOTA,
County of Hennepin, ss:

E. L. Carpenter being by me sworn on oath states: That he is Secretary of Shevlin Carpenter Company, one of the petitioners named in the foregoing petition; that he has read said petition and

knows the contents thereof, and that the same is true to the knowledge of the deponent.

(Signed)

E. L. CARPENTER.

Subscribed and sworn to before me this 15 day of February, 1908.

[SEAL.]

(Signed)

KENNETH P. GREGG,

Notary Public, Hennepin County, Minn.

(My commission expires July 11, '13.)

h On reading the foregoing petition, and upon said petition and the records submitted therewith, it is hereby

Ordered That the writ of error in said petition prayed for be and the same is hereby allowed; provided, however, that the said petitioners, or one of them, give bond according to law in the sum of fifteen thousand dollars, which said bond shall operate as a super-sedeas bond.

Dated April 6, 1908.

(Signed)

CHAS. M. START,

*Chief Justice of the Supreme
Court of the State of Minnesota.*

i [Endorsed:] Original. State of Minnesota, Supreme Court. State of Minnesota, Plaintiff, vs. Shevlin-Carpenter Co. et al., Defendants. Petition for Writ of Error. ———, Attorneys for ———. Clapp & Macartney, A. Y. Merrill and R. J. Powell, Lumber Exchange, Minneapolis, Minnesota, Att'ys for Def'ts.

j In the Supreme Court of the United States.

SHEVLIN-CARPENTER COMPANY, a Corporation, and JOHN F. IRWIN,
Plaintiffs in Error,

vs.

THE STATE OF MINNESOTA, Defendant in Error.

Citation.

The United States of America to the State of Minnesota, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the Supreme Court of the State of Minnesota, wherein the Shevlin-Carpenter Company and John F. Irwin are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles M. Start, Chief Justice of the

Supreme Court of the State of Minnesota, this 6th day of April, A. D. 1908.

CHAS. M. START,
*Chief Justice of the Supreme
Court of the State of Minnesota.*

k [Endorsed:] Original. U. S. Supreme Court. Shevlin-Carpenter Co. et al., Plaintiffs, vs. State of Minnesota, Defendant. Citation. Due and personal service of the within Citation admitted this 10th day of April, 1908. E. T. Young, Att'y Gen., C. S. Jelley, Attorneys for Def't. Clapp & Macartney, A. Y. Merrill and R. J. Powell, Lumber Exchange, Minneapolis, Minnesota, Attorneys for Pl'ffs.

l In the Supreme Court of the United States.

SHEVLIN-CARPENTER COMPANY, a Corporation, and JOHN F. IRWIN,
Plaintiffs in Error,

vs.

THE STATE OF MINNESOTA, Defendant in Error.

Now come the plaintiffs in error in the above entitled cause, and aver and show that in the records and proceedings in said cause the Supreme Court of the State of Minnesota erred to the grievous injury and wrong of the plaintiffs herein, and to the prejudice and against the rights of the plaintiffs in error, in the following particulars, to-wit:

1. The said Supreme Court erred in holding that Section 7 of Chapter 163 of the General Laws of the State of Minnesota for the year 1895, was not in violation and contravention of that portion of the Fourteenth Amendment to the Constitution of the United States, wherein it is enacted and declared that no state shall deprive any person of life, liberty or property without due process of law, and in rendering final judgment against the plaintiffs in error in said cause by reason of such holding.

2. The said Supreme Court erred in holding that the provisions of said Section 7 of Chapter 163 of the Laws of Minnesota for the year 1895 were, and are, not in violation and in contravention of natural justice and do not invade the natural rights of man which are protected by the fundamental principles of the social compact.

3. The said Supreme Court erred in holding that the provisions of Section 7 of Chapter 163 of the laws of Minnesota for the year 1895 were not in violation and in contravention of natural justice, and do not invade the natural rights of man which are protected by the fundamental principles of the social compact and the constitution of the United States.

m 4. That said Supreme Court erred in holding that the provisions of said Section 7 of Chapter 163 of the laws of Minnesota for the year 1895 were and are not in violation and in contravention of the constitution of the United States, and your petitioner alleges that said law is in violation of the Fourteenth

Amendment to the constitution of the United States, in that it also abridges the privileges and immunities of citizens of the United States and denies to persons within its jurisdiction the equal protection of the laws.

5. The said Supreme Court erred in not reversing the judgment of the trial court and in not giving to plaintiffs in error their rights under the constitution of the United States, as claimed and set forth in the record in said cause.

Wherefore for these and other manifest errors appearing in the record, the said Shevlin-Carpenter Company and John F. Irwin, plaintiffs in error, pray that the judgment of the said Supreme Court of the State of Minnesota be reversed and set aside, and held for naught, and the judgment be rendered for the plaintiffs in error granting them their rights under the Constitution of the United States.

And plaintiffs in error also pray judgment for their costs.

(Signed)

A. Y. MERRILL,
Room 335 Lumber Exchange Building,
Minneapolis, Minnesota.

(Signed)

N. H. CLAPP,
Room 406 National German
American Bank Building,
St. Paul, Minnesota.

(Signed)

F. B. KELLOGG,
Merchants National Bank Building,
St. Paul, Minnesota.

n [Endorsed:] Original. U. S. Supreme Court. Shevlin-Carpenter Company, et al., Plaintiff, vs. State of Minnesota, Defendant. Assignments of Error. ———, Attorneys for ———. Clapp & Macartney, A. Y. Merrill and R. J. Powell, Lumber Exchange, Minneapolis, Minnesota, Attorneys for Pl'ffs.

o In the Supreme Court of the United States.

SHEVLIN-CARPENTER COMPANY, a Corporation, and JOHN F. IRWIN,
Plaintiffs in Error,

vs.

THE STATE OF MINNESOTA, Defendant in Error.

Know all men by these presents that we, Shevlin-Carpenter Company, a corporation, created, organized and existing under and by virtue of the laws of the state of Minnesota, and John F. Irwin, as principals, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto the State of Minnesota in the sum of fifteen thousand dollars, to be paid to the state of Minnesota, for which payment well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 17th day of February in the year of our Lord one thousand nine hundred and eight.

Whereas, the above named Shevlin-Carpenter Company, a corporation, and John F. Irwin, plaintiffs in error, seek to prosecute their writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Minnesota.

Now therefore, The condition of this obligation is such that if the above named plaintiffs in error shall prosecute their writ of error to effect, and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and virtue.

p SHEVLIN-CARPENTER COMPANY,
By H. C. CLARKE, *Treasurer.*

Attest:

(Signed)

GEO. S. EDDY, *Ass't Secretary.*

JOHN F. IRWIN. [SEAL.]

THE UNITED STATES FIDELITY &
GUARANTY CO.,

By WIRT WILSON AND
GEORGE E. MURPHY,
Its Attorneys in Fact.

Signed, sealed and delivered in presence of

KENNETH P. GREGG.
LIN W. HOLBROOK.
CARRIE B. AKESON.
L. E. GIBSON.
C. S. BROWN.
BLANCHE W. SCALLEN.

STATE OF MINNESOTA,
County of Hennepin, ss:

Be it known, That on the 17th day of February, A. D. 1908, before me personally appeared H. C. Clarke, the Treasurer, and Geo. S. Eddy, the Assistant Secretary of the Shevlin-Carpenter Company, the corporation whose name is subscribed to the above and foregoing bond, and who being each by me first duly sworn did each for himself depose and say that the said H. C. Clarke is the Treasurer, and the said Geo. S. Eddy is the Assistant Secretary of said Shevlin-Carpenter Company; that the seal affixed to said bond is the corporate seal of said Shevlin-Carpenter Company, and that the said instrument was executed and the seal of said corporation affixed thereto pursuant to authority duly given by the Board of Directors of said corporation; and the said H. C. Clarke and Geo. S. Eddy did acknowledge the execution of said instrument as the free act and deed of said corporation.

(Signed)

KENNETH P. GREGG,
Notary Public, Hennepin County, Minnesota.

(My commission expires July 11, 1913.)

9 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 17th day of February, 1908, before me a Notary Public within and for said County and State, personally appeared *Wirt Wilson* and *George E. Murphy*, to me personally known, who being by me duly sworn upon oath did say that they are the Agents and Attorneys-in-Fact of and for The United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., created, organized and existing under and by virtue of the laws of the State of Maryland; that the corporate seal affixed to the foregoing within instrument is the seal of said Company; that the said seal was affixed and the said instrument was executed by authority of its Board of Directors; and the said *Wirt Wilson* and *George E. Murphy*, did acknowledge that they executed the said instrument as the free act and deed of said Company.

(Signed)

E. A. FORCE,
Notary Public, Hennepin County, Minn.

(My commission expires Sept. 30, 1909.)

r STATE OF MINNESOTA,
County of Hennepin, ss:

On this 17th day of February, A. D. 1908, before me, a Notary Public within and for said county, personally appeared the above named *John F. Irwin*, to me known to be the person described in, and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[SEAL.]

JAMES C. MELVILLE,
Notary Public, Hennepin County, Minn.

(My commission expires Sept. 1, 1909.)

I hereby approve the above and foregoing bond, both as to form and sureties, this 6th day of April, A. D. 1908.

(Signed)

CHAS. H. START,
Chief Justice of the Supreme Court
of the State of Minnesota.

s [Endorsed:] Original. U. S. Supreme Court. *Shevlin-Carpenter Company et al., Pl't'ffs, vs. State of Minnesota, Defendant.* Bond. ———, Att'ys for ———. *Clapp & Macartney, A. Y. Merrill, and R. J. Powell, Lumber Exchange, Minneapolis, Minnesota, Attorneys for Pl't'ffs.*

1 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1907.

STATE OF MINNESOTA, Respondent,

vs.

SHEVLIN-CARPENTER Co., a Corporation, and JOHN F. IRWIN, Appellants.

Paper Book.

Complaint.

The plaintiff complains of the defendants and for cause of action alleges:

That the defendant Shevlin-Carpenter Co. is now, and at all times herein mentioned was, a corporation organized, existing and doing business under and by virtue of the laws of the state of Minnesota, with its office and principal place of business in the county of Hennepin in said state.

2 That plaintiff is now, and during all the times herein alleged has been, the owner in fee of the following described land, situate, lying and being in the county of St. Louis, state of Minnesota, to-wit: Section sixteen (16), township fifty-nine (59), range twenty-one (21), according to the United States government survey thereof.

That in the winter of the years 1903-04 said land was covered with a heavy growth of valuable pine timber, the property of plaintiff, and said land was of the class of land owned by the state known in its laws as "School Land."

That in the winter of the years 1903-04 the defendants, acting and co-operating together, and well knowing that plaintiff was the owner of said land and the timber thereon, without a valid and existing permit for them or either of them so to do, but wrongfully and in violation of law, entered upon and caused and employed their servants, agents and employes to enter upon said land, and then and there they and their servants, agents and employes, employed by them, did willfully, wrongfully and unlawfully cut and remove 2,444,020 feet of timber from said land of the reasonable worth and value, at the time it was so cut and removed, of \$17,108.14.

That by reason and on account of such willful, wrongful and unlawful entering and trespass upon said land and the cutting and removing of timber therefrom, as aforesaid, by said defendants, said defendants and each of them are liable to the plaintiff, as and for damages, for treble the value of the timber so cut and removed by them, to-wit: the sum of \$51,324.42.

3 Wherefore, the plaintiff demands judgment against the defendants, and each of them, for the sum of \$51,324.42, together with the costs and disbursements of this action and for all proper relief.

EDWARD T. YOUNG,
Attorney General.
C. S. JELLEY,
Attorneys for Plaintiff.

(Title of Cause.)

Come now the defendants, and answering the complaint of the plaintiff in the above entitled action:

1st. Admit that the defendant, Shevlin-Carpenter Company, is a corporation, as alleged in said complaint.

2d. Admit that plaintiff is and was the owner of the premises described in said complaint, and that said land was of the class in said complaint alleged, and that the same was covered with a heavy growth of pine timber, as alleged therein.

3d. Defendants admit that they entered upon said premises in the winter of the years 1903-4 and cut and removed certain logs and timber therefrom, and that the quantity so cut and removed was 2,444,020 feet, board measure, but the defendants deny that they did so without a permit therefor, or that they cut or removed such timber in violation of law. And the defendants further deny that said timber was of the reasonable worth or value of \$17,108.14, or that said defendants, or either of them, are liable to the plaintiff for treble the value of the timber so cut and removed, or any part thereof.

And in that behalf these defendants allege that the provisions of Section 7, Chapter 163, of the General Laws of 1895, under
4 which the plaintiff seeks to recover a penalty or enhanced damages from these defendants by reason of the alleged acts of trespass in said complaint set forth, is in violation and contravention of that portion of the 14th Amendment to the Constitution of the United States, wherein it is enacted and declared "that no state shall deprive any person of life, liberty or property without due process of law," and that the said provisions of said section 7 are also in violation and in contravention of natural justice, and because they invade the natural rights of man, which are protected by the fundamental principles of the social compact.

And in that behalf the defendants further allege that the defendant, John F. Irwin, is, and during all the times herein, or in said complaint stated, was a citizen of the United States.

4th. These defendants further answering allege and show to the court that at a sale of pine timber upon state lands, held at the state capitol, in the city of St. Paul, on the 14th day of November, 1900, the pine timber suitable for saw logs, and over 8 inches in diameter twenty-four feet from the ground, standing, growing or being upon the premises described in said complaint, was sold at public auction to the defendant, John F. Irwin, at and for the agreed price of \$7.00 per thousand feet, board measure, said John F. Irwin being the highest bidder therefor. That thereafter and in due course of business a permit to cut and remove such timber was executed to said Irwin by R. C. Dunn, at that time the auditor and land commissioner of said state, a copy of which said permit is hereunto annexed, marked Exhibit A, and hereby made a part hereof as fully as though incorporated herein.

5 And in that behalf these defendants allege that said defendant John F. Irwin was, during all the times mentioned herein, and is now the agent and representative of the said

defendant, Shevlin-Carpenter Company, and did make the bid for such timber at the sale hereinbefore mentioned, and did enter into the contract or permit herein described as the agent or representative of said Shevlin-Carpenter Company, and for and in its behalf, all of which the land commissioner and board of timber commissioners of said state, consisting of the governor and state treasurer and land commissioner, well knew.

Defendants further allege that at the time of executing said permit said John F. Irwin duly executed and delivered to the state a bond, with sureties, in all respects in accordance with the statute in such case made and provided.

5th. That thereafter and before the time limited by said contract or permit within which to cut and remove such timber, the board of timber commissioners of said state, upon the application of these defendants, and for good cause shown, did extend said contract or permit until the first day of June, 1903. That thereafter and prior to the first day of June, 1903, these defendants, and particularly said Shevlin-Carpenter Company, made it to appear to the entire satisfaction of said board of timber commissioners, and all the members thereof, that it was impossible for said defendants to cut and remove the timber from said land before the first day of June, 1903, and thereupon said board of timber commissioners, acting unanimously, and being fully advised of the facts, did duly extend said permit for an additional year and did authorize and empower these defendants to cut and remove said timber, in accordance with the terms of said permit, during the logging season of the year

6 1903-4, upon condition that said defendants pay to the state the amount provided for by said contract or permit, with interest thereon at the rate of eight per cent. per annum for such additional year.

6th. These defendants further allege that pursuant to said contract and permit, and the extension thereof, and the authority vested in them by said board of timber commissioners, they did enter upon said premises during the logging season of the year 1903-4 and did cut and remove therefrom 2,444,020 feet, board measure, of logs or timber, and did in all things comply with and perform the terms and conditions imposed upon these defendants by said permit, and the extension thereof, and the surveyor general of the second lumber district of the state of Minnesota duly scaled and returned the amount of said logs and timber so cut. That thereupon the state treasurer computed the amount that would be due from these defendants for said timber so cut and removed at the contract price, adding thereto interest at the rate of eight per cent. per annum for one year, and the sum of \$147.20 for the expense of scaling, amounting in all to the sum of \$18,514.39, and having deducted therefrom the sum of \$1,379.00 which was paid by these defendants at the time of the execution of said permit, the state treasurer made his draft upon this defendant, John F. Irwin, for the balance so found to be due, to-wit: the sum of \$17,144.39. Thereupon and on the 2d day of June, 1904, in pursuance of the several agreements hereinbefore set forth, these defendants paid into the treasury of

the state of Minnesota the sum of \$17,144.39 in full settlement, satisfaction and discharge of any and all claims of the plaintiff, State, against these defendants, or either of them, for or on account of the cutting and removal of said timber, and said sum was
7 accepted and received by the plaintiff, State, in such full settlement, satisfaction and discharge of all such claims.

And these defendants further aver that in the cutting and removal of said timber, and in all things done by these defendants, or either of them, in or about the purchase of said timber, procuring of extensions of time to cut the same, and in cutting and removing the same, and paying therefor, all as hereinbefore alleged these defendants, and each of them, acted in entire good faith, believing that the said permit, and the extensions thereof, were valid, and that thereby there was conferred upon these defendants the full and perfect right and authority to cut and remove said timber, and that the said board of timber commissioners and the several members thereof, the governor, the state auditor and the state treasurer, had full, ample and complete authority to do and perform the several acts done and performed by them, both individually and collectively, as hereinbefore alleged.

7th. These defendants further allege that ever since said 2d day of June, 1904, the state has kept and retained the money so paid to it by these defendants in settlement for said timber so cut and removed, and has not returned the same, or offered to return it, or any part thereof, to these defendants, or to place these defendants in statu quo, nor has the state obtained or sought the rescission of the transactions hereinbefore set forth in any court of law or equity, by reason whereof the state is estopped and debarred from maintaining this action.

8th. Further answering these defendants reallege and set forth all of the allegations contained in paragraph numbered 4th, 5th and 6th of this answer, as fully and completely as if such allegations were again set forth herein at length. And these defendants
8 further aver that if for any reason the cutting and removal of said timber, or the settlement therefor and payment of the amount ascertained to be due, all as hereinbefore alleged, were not authorized by law so that such settlement cannot be held to be a bar to any action by the plaintiff against these defendants for or on account of the matters and things in said complaint and herein set forth, then these defendants are entitled to have the sum of money paid by these defendants to said plaintiff, as hereinbefore alleged, to-wit: the sum of \$18,514.39, set off against any claim that the State, plaintiff herein, may be adjudged to have against these defendants, or either of them, or on account of the cutting and removal of said timber, or any thereof.

9th. Save and except as herein admitted, qualified or otherwise denied, the defendants deny each and every allegation, matter and thing in said complaint alleged.

Wherefore, the defendants demand judgment that the plaintiff take nothing by this action. Or, if it shall be determined that the plaintiff is entitled to recover anything against these defendants, or

either of them, then the defendants demand that the amount paid by them, as aforesaid, be offset against such amount.

A. Y. MERRILL,

CLAPP & MACARTNEY,

Attorneys for Defendants, 335 Lumber Exchange,

Minneapolis, Minn.

H. B. FRYBERGER,

R. J. POWELL,

Of Counsel.

9

EXHIBIT A.

Articles of agreement, made and entered into this 14th day of November, 1900, by and between R. C. Dunn, Land Commissioner of the State of Minnesota, for and on behalf of said state, party of the first part, and John F. Irwin, of Minneapolis, Minn., party of the second part:

Whereas, at a public sale held at the State Capitol, in the City of St. Paul, in the State of Minnesota, on the 14th day of Nov., 1900, pursuant to the provisions of Chapter 163, General Laws of 1895, and acts amendatory thereof, of which said sale due notice was given in the St. Paul Pioneer Press for fifty-six days next preceding the same, together with a list of all lands containing stumpage offered at said sale, which was published for three successive weeks in the St. Paul Pioneer Press next preceding the day of sale, the pine timber, upon the following described land, situate in the County of St. Louis, in said State, to-wit: Section 16, Township 59, Range 21, was sold at the following price: Pine, per M feet, Seven Dollars; Tamarack, per tie (8 feet lineal measure).....; Cedar per pole; Cedar per cord; was sold to John F. Irwin at prices above specified per thousand feet, board measure, and per piece or cord as the case may be, he being the highest bidder for the same; and, whereas, prior to said sale the timber upon said land had been duly estimated and appraised, from the estimate and appraisal thereof it appears as follows: The amount of pine timber growing thereon, measuring not less than eight inches in diameter 24 from the ground is 1,370 M., valued at \$4 per M. feet. The number of tamarac ties thereon is valued at 10 per tie. The number of cedar poles thereon is valued at per pole. The number of cords of cedar thereon is value at per cord, together with a statement of the situation of the timber relative to risk from fire and damage of any kind, and its distance from the nearest lake, stream or railroad; and whereas, said estimate and appraisal was duly submitted to the officers designated by said Chapter 163, General Laws of 1895, and said officers deeming said timber subject to waste and destruction, and that such sale is necessary to protect the State from loss:

Witnesseth, That said party of the first part for and in consideration of the premises, and the sum of thirteen hundred and seventy

dollars, paid into the State Treasury on the 14th day of November, 1900, being twenty-five per centum of the appraised value of the timber sold contained on said above premises, and the promises and agreements hereinafter contained, to be performed on the part of the said party of the second part, does hereby grant unto the said party of the second part, his executors, administrators and assigns, the right, privilege, and permission to enter upon the land hereinbefore described and cut and remove therefrom during the logging season of 1900, 1901, 1902 (this permit expires June 1st, 1902), all pine timber measuring not less than eight inches in diameter twenty-four feet from the ground, being upon the piece or parcel of land hereinbefore described.

And said party of the second part in consideration of the grant, privilege and permit aforesaid, do hereby promise and agree his executors, administrators and assigns; that he will enter upon said lands as soon as the regular logging season, as aforesaid, shall commence, with a sufficient number of men and teams to enable him to cut and haul all the timber upon said land of the dimensions and varieties above stated; that he will cut the same clean, acre by acre, as he goes without waste and with as little damage as possible to the young timber and hardwood growing on the premises; that he will bank and land said logs (or other timber, as the case may be) separately from all others, and failing so to do, all other logs banked or landed with them shall be marked with the mark or marks hereinafter stated, and all other lumber mixed or rafted with the lumber manufactured therefrom shall be scaled with it, and all shall be considered and scaled as having been cut upon said land under this contract, and the stumpage shall be estimated accordingly; that he will notify the Surveyor General of the district and the State Land Commissioner, in writing, at least fifteen days prior to entering upon said premises with the purpose of cutting timber, and that he will also duly notify the two last named officers, in writing, at least fifteen days prior to removing any of said timber of his intention to remove the same, that he will use due precaution to remove all timber cut during the season and bank and land said logs in such manner as to afford all reasonable facilities for driving the same; that he will mark the same in a plain and substantial manner with the following log marks, to-wit: End mark MIN, Bark mark for the first season, Bark mark for second season, which said marks shall be properly recorded in the office of Surveyor General of logs and lumber of the 5th district in the name of the State of Minnesota; that he will not use the above bark mark on any other logs but those cut on said above described premises, nor for more than one logging season; that he will mark all logs cut from said premises with said marks and no others; that in case of failure on the part of the second party to place upon any log or logs both the bark mark and stamp mark required by law, the said first party shall have the right to seize and take possession of all said timber not so marked wherever the same may be found; that no extension of time of this permit shall be granted except as provided in Section 24, Chapter

163, General Laws of 1895; that he will pay the State permit price for all timber remaining standing or remaining cut and not removed from the premises which he has agreed to cut, haul and remove, after the expiration of this permit; that he will pay to the State Treasurer of the State of Minnesota, upon the draft of the Auditor of said State, for logs or other timber cut under and in pursuance of this contract, and covered by this contract, the above amount per thousand feet, board measure, per piece or per cord as the case may be, less estimated twenty-five per centum paid at time of sale (the State Land Commissioner to determine what per cent. of moneys paid at time of sale is to be deducted from first season's cut) as provided by Sections 36 and 37, Chapter 163, General Laws of 1895, and upon such payment the party of the first part, shall execute a release of the logs or other timber and transfer the mark thereon; Provided, however, and it is hereby expressly understood and agreed by and between the parties hereto, that until the terms of this contract shall have been fully complied with and performed on the part of the said party of the second part, all the logs or other timber, which may so be cut as aforesaid shall remain the property of said party of the first part.

And it is further mutually agreed, that in case the said party of the second part shall fail to comply with the terms of this agreement, and shall fail to pay the amount of such draft or drafts within ten days after the same have been placed in the hands of the

13 State Treasurer for collection, it shall be the duty of the State Land Commissioner, and he shall have the right, and is hereby fully empowered, at his option, at any time, to enter upon the said land or other premises and take possession of said logs or other timber as well as any lumber manufactured therefrom, where-soever the same may be, and to sell the same at public auction to satisfy the claim due the State for all timber which shall have been cut under this contract, together with the costs and expenses of taking possession of, keeping and selling such logs and lumber or other timber, or either, with a reasonable compensation for the time and trouble for himself or his agent in attending thereto, paying the surplus, if any, to the said party of the second part; that all logs cut upon said lands or banked or landed with them, as well as any lumber made therefrom, shall be scaled by the Surveyor General of logs and lumber for the district in which the same may be, in the manner provided by Section 27, Chapter 163, General Laws of 1895, and the scale bill rendered by him shall be final and conclusive between the parties thereto; Provided, however, that the State Land Commissioner may question the correctness of any scale made by the Surveyor General, and cause a re-scale to be made in manner and form as provided for in said Section 27, Chapter 163, General Laws of 1895.

And it is hereby further provided that all charges and expenses incurred in scaling the timber cut under the provisions of this permit shall be advanced by the party of the first part, and all such charges for scaling timber cut under this permit, shall be included in drafts drawn by the State Auditor in payment for any timber

cut, and due under the terms of this permit, and shall be paid by said party of the second part.

It is further specifically agreed that if the party of the
14 second part fail or neglects to cut and bank the stumpage as above specified, it shall be lawful for the State to re-sell the same at any time after June 1st, 1902, and to convert all proceeds of such sale to its own use and purposes whatsoever.

In testimony whereof, the said parties of the first and second part have hereunto set their hands in duplicate the day and year first above written.

R. C. DUNN,

Commissioner of State Land Office.

JOHN F. IRWIN.

In presence of
SWAN B. MOLANDER.

Within permit extended to June 1st, 1903 on account of winter breaking up so early.

S. R. VAN SANT, *Governor.*

J. H. BLOCK, *State Treasurer.*

R. C. DUNN, *State Auditor.*

(Title of Cause.)

Reply.

The plaintiff for reply to the answer of the defendants herein admits that the defendant, John F. Irwin, is and was a citizen of the United States, as in said answer alleged; admits the allegations of the fourth paragraph of said answer and the first
15 sentence of the fifth paragraph; avers that the timber permit therein referred to was duly issued and was known and designated as No. 358B; that said permit, among others, contained this provision: "No extension of time of this permit shall be granted except as provided in Section 24, Chapter 163, General Laws 1895;" that under said section and chapter only one extension of the time of said permit can be granted; that one such extension was duly granted; that the same expired June 1st, 1903, when said permit became absolutely null and void, and there could be and was no legal extension of the time of said permit beyond said first day of June, 1903, all of which defendants well knew at the time of the cutting and removal of the timber mentioned in the complaint; and denies that in entering upon the lands and in cutting and removing the timber, as admitted by them, defendants acted in good faith and believed that they had full right and authority so to do.

Admits the payment, at the times mentioned in the answer, by the defendants to the plaintiff, of the various sums of money therein set forth and in the way therein designated, and that the plaintiff has kept and retained said sums of money and has not returned the same, or offered to return the same, or any part thereof, to the defendants; but specifically denies that said sums of money, or any part or portion

thereof, were paid by the defendants in full settlement, satisfaction and discharge of any and all claims of the plaintiff against the defendants, or either of them, for or on account of the cutting and removal of the timber admitted to have been cut and removed by the defendants, and denies that such sums of money, or any part or portion thereof, were accepted and received by the plaintiff in
16 full settlement, satisfaction and discharge of all claims of the plaintiff against the defendants by reason and on account of the cutting and removal of said timber.

Avers that under and by virtue of the terms of said permit No. 358B and under and by virtue of Chapter 163, Laws 1895, immediately when the time of said permit and the legal extension thereof expired, namely, June 1st, 1903, the defendants became indebted to and were liable to pay the plaintiff for any and all timber which they had purchased under said permit No. 358B, and which they had neglected and failed to cut and remove from the lands, in said permit described, prior to the expiration of said permit and the legal extension thereof, at the full permit price mentioned in said permit 358B, and that the amount of timber which they failed and neglected to cut and remove and for the payment of which they became liable at the permit price, as aforesaid, was the amount mentioned in the complaint and which defendants admit they cut and removed after June 1st, 1903.

Avers that defendants, recognizing and acknowledging the liability that had accrued against them under the terms of said permit and the extension thereof and under the laws of the state of Minnesota, by reason of their failure and neglect to cut and remove the timber purchased by them within the life of said permit and the legal extension thereof, to discharge such liability in full, in addition to the money theretofore paid by them, paid the plaintiff the sum of \$17,144.35, the same being the balance due according to the terms and conditions of said permit, and the plaintiff received said sum from the defendants in payment and discharge of such liability and for no other purpose; and avers that defendants are not entitled
17 to have the sum of \$18,514.39 paid by them to the plaintiff, or any part or portion thereof, set off against any claim that the plaintiff herein may be adjudged to have against the defendants, or either of them, or on account of the cutting and removal of the timber mentioned in the complaint, or any thereof; save and except as herein admitted, specifically denied or qualified, and excepting the admissions of the defendants plaintiff denies each and every allegation, matter, fact and thing in said answer contained.

Wherefore, plaintiff asks for judgment as in the complaint prayed for.

Dated September 12th, 1906.

EDWARD T. YOUNG,
Attorney General.

C. S. JELLEY,
Assistant Attorney General,
Attorneys for Plaintiff, State Capitol, St. Paul, Minnesota.

(Title of Cause.)

Proposed Case.

The following case contains all the evidence offered on the trial of this cause, also all objections, rulings, orders, instructions, and all other proceedings at said trial, and the same hereby is proposed as a case herein, to be settled and allowed before the Hon. J. D. Ensign, the judge who tried the case.

18 You are notified to serve any amendments that you may propose thereto within ten days from date hereof.

Dated July 3d, 1907.

CLAPP & MACARTNEY,
A. Y. MERRILL AND
R. J. POWELL,
Attorneys for Defendants.

H. B. FRYBERGER,
Of Counsel.

To Hon. E. T. Young, Attorney General, and C. S. Jelley, Esq.,
Assistant Attorney General.

(Title of Cause.)

This cause came on to be heard at a regular term of this court held in and for the county of St. Louis, at the court house in the city of Duluth, Minnesota, before the Hon. J. D. Ensign, judge, without a jury, on the 21st day of November, A. D. 1906, whereupon the following evidence was taken and proceedings were had, to-wit:

Appearances.

For the State: Edward T. Young, Esq., Attorney General, and C. S. Jelly, Esq., Assistant Attorney General.

For the Defendants: Messrs. A. Y. Merrill, Newell H. Clapp and H. B. Fryberger.

19 Mr. CLAPP: I understand counsel for the State are about to offer this stipulation we have made. We desire to interpose at this time an objection to any evidence under the complaint in this action upon the ground that the complaint does not state any facts sufficient to constitute a cause of action, the complaint being based upon Section 7 of Chapter 163 of the Laws of 1895.

It is contended by the defendants that that section and chapter, so far as it bears upon this case anyway, is unconstitutional and void, both under the constitution of the state of Minnesota and the constitution of the United States.

The particular grounds upon which it is insisted that the law is void under the constitution of the United States being set forth in the third paragraph of the answer.

Objection overruled, to which ruling the defendants duly except.

Mr. YOUNG: It is stipulated by the parties and may be taken as

proved in this case that the single value of the pine; the stumpage, in controversy was at the time the same was taken, six dollars per thousand feet.

Plaintiff rests.

HOVEY C. CLARKE, being duly sworn as a witness on behalf of defendants, testifies as follows:

Direct examination.

By Mr. MERRILL:

Q. Mr. Clarke, where do you reside?

A. Minneapolis, Minnesota.

20 Q. Your name is Hovey C. Clarke, is it?

A. Yes, sir.

Q. In what business are you engaged?

A. Lumbering.

Q. Are you connected with the defendant in this action?

A. I am the treasurer of the Shevlin-Carpenter Company.

Q. How long have you been connected with it?

A. Ever since its organization.

Q. How many years ago was that?

A. The company was organized in 1886 as the Hall & Ducey Lumber Company and the name was changed in 1892 to Shevlin-Carpenter Company.

Q. This company's particular place of business is at what point?

A. Minneapolis, Minnesota.

Q. You are engaged in what business there—the company?

A. Lumber business.

Q. Manufacture of lumber?

A. Manufacturing and marketing of the manufactured product.

Q. And cutting logs?

A. Yes, sir.

Q. Were you so engaged in that business in the year 1900?

A. Yes, sir.

Q. And you were at that time connected with the company?

A. Yes, sir.

Q. Do you know anything personally of the transaction in relation to the permit mentioned in the pleadings in this case to cut timber from state lands on Section 16, Town 59, Range 21, in the county of St. Louis?

A. I do.

Q. Did you, for the company, investigate that matter at the time of the state sale of that timber yourself; have charge of it?

A. I can't say, but I presume I did. I have no recollection of it now.

21 Q. Do you remember about the permit being issued?

A. I do.

Q. The admissions in the pleadings show that the permit was extended for one year, and regularly endorsed, after its expiration? That would make it in its expiration 1903, would it?

A. Yes, sir.

Q. 1903 with the extension?

A. Yes, sir.

Q. Did you have anything to do with this permit or securing and attempting to secure an extension of it at or about this time?

A. Yes, sir.

Q. About June, 1903?

A. Yes, sir.

Q. State to the court what you did, who you saw, what you said, as near as you can now recollect.

Mr. YOUNG: The State objects to the question on the ground that it is incompetent, irrelevant and immaterial, for the reason the permit shows upon its face that it could not be extended after June, 1903.

Evidence received subject to the objection.

Objection overruled.

A. In June, 1903, I had returned from a trip abroad and I was told by our land man that he had some permits that were expiring and that I had better see the state auditor about them. So I took, I think, three permits over to the state auditor, two of which had run two years and this one had run three years. I handed them to Mr. Iverson, who was then the state auditor, and he said, "There will be no trouble, I think, about getting an extension of these two that had run two years, but this other one"—

Mr. MERRILL:

Q. Referring to what?

A. Referring to the one that had run three years and the permit in question. "Will have to come up before the state timber board. There is a number of permits that are in the same shape as this and the state timber board will have to pass on the extension." The word was received later at our office that the state timber board had passed on the extension and we were allowed to go on and cut this timber by paying the amount stated in the permit with an additional eight per cent. per annum for one year from the time of the extension. We went on and cut this timber in the ordinary course of business, the surveyor general's scale showing—the state auditor rendered—made a draft on us for the amount plus the interest and scaling charges, less the amount we had paid in, some \$1,350. We paid the sum to the state treasurer and received his receipt for it in the same manner as we did all the timber that we cut that year belonging to the state.

Q. At that time that you cut the timber, Mr. Clarke, did you or the Shevlin-Carpenter Company, any of its agents or officers, so far as you know, have any reason to think that you had not the right to cut that timber, and did you cut it in good faith, believing that you did have the right?

Mr. YOUNG: The State objects to the question on the ground it is incompetent, irrelevant and immaterial, and calling for a conclusion of the witness; for the further reason that the permit shows upon its face that it could not be extended beyond June 1st, 1903, and that

the cutting, of any timber under it after that date was prohibited by the terms of the permit and by the statute under which it was issued.

Evidence received subject to the objection.

Objection overruled.

A. Absolutely good faith.

Mr. MERRILL:

23 Q. Do you know, Mr. Clarke, whether or not permits under like circumstances had, prior to that time, been extended in the manner that this one was?

Mr. YOUNG: The State objects to the question on the ground it is irrelevant and immaterial; for the further reason it is hearsay.

Evidence received subject to the objection.

Objection overruled.

A. It is my understanding that there have many permits, in the past and at this time, been extended in the same manner.

Mr. MERRILL:

Q. The question is, whether you know, not your understanding. Do you know of any such permits?

A. I certainly do.

Q. Mr. Clarke, examine defendant's Exhibit 1, if you please. Is that the draft which was issued for payment of this timber?

A. That was drawn on me—the company—on Mr. Irwin.

Q. And it was paid, was it?

A. Yes, sir.

Q. Show you Exhibit 3. This is the receipt?

A. That is the receipt for money paid on that draft.

Q. Show you Exhibit 4. Is that a statement?

A. That is a statement accompanying the drafts.

Q. There is more than one draft there?

A. Two drafts.

Q. That was for a separate lot of timber?

A. Yes, sir.

Q. They both came at the same time?

A. Yes, sir.

Q. Exhibit 2. Is that the draft for the other lot referred to?

A. This is the receipt for the other lot.

Q. Receipt for it, rather.

A. This is the receipt for the other lot.

Q. Referred to?

A. Referred to.

24 Mr. MERRILL: Defendants offer in evidence defendants' Exhibits 1, 2, 3 and 4.

Mr. YOUNG: Exhibit 2 relates to an entirely different tract of land. I do not see why that is offered. I cannot see that it has any application. And therefore I would ask the court to rule upon that now. That relates to timber cut in Section 36. It would be in this same township, but in Section 36. The only complaint is about Section 16.

Mr. MERRILL: I was offering them for the purpose of showing the method in which this was done. We claim it is competent for the purpose of establishing, in apposition to their claim, that the money was paid by us for timber left standing, that we paid it for timber cut and in precisely the same way that all payments are made to the state for timber cut and not for timber left standing as alleged in their complaint; that it is competent for that purpose.

Exhibit 2 is received subject to the objection.

Objection overruled.

Exhibits 1, 3 and 4 received without objection.

No cross-examination.

SAMUEL G. IVERSON, being duly sworn as a witness on behalf of defendants, testifies as follows:

Direct examination.

By Mr. MERRILL:

Q. What is your name?

A. Samuel G. Iverson.

Q. Where do you reside, Mr. Iverson?

A. I am at present residing at St. Paul.

25 Q. What official position in this state do you hold?

A. I am state auditor.

Q. How long have you been such state auditor?

A. Since about the first of January, 1903.

Q. Were you employed in the auditor's office prior to that time?

A. Yes, sir.

Q. In what capacity?

A. I was the deputy state auditor from January, 1895, until I became auditor in 1903.

Q. Do you know Mr. Hovey C. Clarke, of the Shevlin-Carpenter Company, the witness on the stand?

A. Yes, sir.

Q. How long have you know him?

A. Oh, I couldn't say; several years; perhaps eight or ten years.

Q. Did you at any time have any conversation with him in reference to the permit number 358B, referred to in this controversy?

A. I think I did have a conversation with him about that; yes, sir.

Q. Can you tell about what time that was, Mr. Iverson?

A. It was sometime, I should judge, in the spring of 1903.

Q. At what place did that conversation take place?

A. It was in the state auditor's office.

Q. At St. Paul?

A. Yes, sir.

Q. Can you state at this time what conversation you had in reference to this permit with Mr. Clarke, what he said to you and what you said to him, as near as you can recollect?

Mr. YOUNG: If it refers to extending the permit beyond June 1, 1903, the State desires to object on the ground the evidence is incompetent, irrelevant and immaterial and for the reason that the law

of the state provides distinctly that a permit shall not be extended after it has expired; that is, after the first year's extension has expired; and for the further reason that the permit of itself, of its terms and upon its face provided that it should be absolutely void at the expiration of the first extension, one year, which expired on June 1st, 1903.

Evidence received subject to the objection.

Objection overruled.

A. Mr. Clarke called in connection—to inquire about the condition of this permit which he had, one of them being the one in question, and stated that they had been unable to cut it during the life of that permit. And he wanted to know what could be done with it. I explained to Mr. Clarke that under the law I had no authority to grant that extension. But I called his attention, however, to what had taken place regarding some other permits which were similarly situated; that they were about to expire or had expired and that the timber board, consisting of the governor, state treasurer and the state auditor, had heard the statement of the parties interested and had practically consented to permit them to cut that timber the succeeding year on condition that they would pay 8 per cent. interest.

Mr. MERRILL:

Q. That is, the timber board had practically consented?

A. Yes, sir. And I stated to Mr. Clarke that inasmuch as he appeared to have as good a reason for asking it as they had that we should treat him just the same as we had agreed to treat the others.

Q. Who did you mean by "we?"

A. That is, the timber board and myself. Undoubtedly would. And whether or not that was afterwards submitted to the timber board I am not clear and I won't be able to state positively. But it seems quite reasonable that at some later time I did call that matter to the attention of the timber board and stated to them that

27 there were other permits similarly situated to the ones that had been acted upon specifically by the board. And there were others besides Mr. Clarke's. And I stated that I thought we would have to treat all alike. We could not give a concession to one and refuse it to another. And that statement was—whether that was conveyed to Mr. Clarke at the time or not, or just when, I couldn't say. But that is my recollection of what took place at that time.

Q. He was informed of that at some time, was he?

A. Yes.

Q. Was there any objection on the part of any member of the timber board to treating them all alike, as you have termed it?

A. No, sir.

Mr. YOUNG: I desire the same objection entered to all of these questions on this subject.

Same ruling: Objection overruled.

Mr. MERRILL:

Q. You were the auditor of state at that time?

A. Yes, sir.

Q. This timber was subsequently cut as shown by the pleadings?

A. Yes, sir.

Q. Surveyed by the surveyor general in the usual way?

A. Yes, sir.

Q. And the return made and payments made in the usual way for timber cut and removed under a permit?

A. Yes, sir.

Q. That money is still in the state treasury?

A. I think so.

Q. I show you defendants' Exhibit 1, Mr. Iverson. That is the draft drawn by you for the timber as shown by the return of the surveyor general, cut from this section in controversy?

A. Yes, sir.

Q. Is that in the usual form of the draft used in the auditor's office for timber cut under unexpired permits, with the exception of the interest clause in there?

28 A. Yes, sir, that is the usual form.

Q. Mr. Iverson, have you, at the request of the attorneys for the defendant in this case, made an examination of the records in your office, the auditor's office, as to whether or not there is a record of the meetings of the timber board in the fall of 1900.

A. Yes, sir.

Q. Have you made such an examination?

A. I have.

Q. Were you able to find any record of the meetings of the timber board during that time?

Mr. YOUNG: What is the object of that testimony?

Mr. MERRILL: Well, the object of it is, that you claim you are entitled to offset this money that we have paid upon the theory that you have a valid and existing permit and under that permit we are compelled to pay for the value of the timber left standing. We claim that your permit was invalid.

Mr. YOUNG: Both parties plead that permit as valid.

Evidence received subject to the objection.

Objection overruled.

A. I made an examination of the files of the office, that is, the files where matters of this kind would be liable to be kept, and I found only one file containing a record of the proceedings of the timber board.

Mr. MERRILL:

Q. Was there no record, no book or other folio containing a record of the meetings of the timber board prior to January 1st, 1901, in your office?

A. I found no book of records of proceedings of the meetings of the timber board prior to about, I should think, those meetings held after the first of January, 1904.

29 Q. Prior to that time there was no such record in any form?

A. Prior to that time I was unable to find any record of such proceedings.

Q. Do you know W. A. Cowing?

A. Yes, sir.

Q. How long have you known him?

Mr. YOUNG: It is understood that this is all under our objection?

The COURT: All under the objection and received the same as the other testimony.

Objection overruled.

A. I have known him about 14 years.

Mr. MERRILL:

Q. Where has he been employed to your knowledge during the time you have known him?

Mr. YOUNG: I desire to interpose one further objection, that the evidence that is now being taken is stated by counsel to be for the purpose of impeaching the validity of the permit and for that reason we desire to offer the additional objection to the testimony that the validity of the permit is pleaded in the answer of defendant and is admitted in the reply of the plaintiff and therefore is beyond the realm of impeachment.

Evidence received subject to the objection.

Objection overruled.

A. He was for a time employed in the Federal building in St. Paul, in just what capacity I do not know; but for the past 12 years he has been employed in the state auditor's office.

Mr. MERRILL:

Q. And you have been in there during all of that time and know what of your own knowledge, do you?

A. Yes, sir.

30 Q. Do you know whether or not in September, 1900, he was employed in the office of the secretary of state of this state?

A. No, sir, he was not.

Cross-examination.

By Mr. YOUNG:

Q. Now, Mr. Iverson, at the time that Mr. Hovey Clarke came to you to talk about the extension of the permit in question, you were state auditor?

A. Yes, sir.

Q. And at that time you knew that it was beyond the power of yourself as state auditor, also beyond the power of the timber board of which you were a member, to extend that permit any further, did you not?

A. I did.

Q. And you told Mr. Clarke that fact, did you not?

A. That is my recollection of it, yes sir.

Q. That the extension could not be made under the law?

A. Yes, sir.

Q. Now, at the time to which your attention has been directed by counsel for defendant, in 1900, I will ask whether you were state auditor at that time?

A. No, sir.

Q. You were not at that time a member of the state timber board?

A. No, sir.

Q. You were only a member of the state timber board ex officio, that is, by virtue of your office of state auditor.

A. Yes.

Q. And you have been a member of that board only while you have been state auditor? To November 1st, 1906.

31 A. Yes, sir.

Q. Now, you don't know, do you, whether the timber board met during the fall of 1900 at any particular time or transacted any particular business?

A. No, sir, I do not.

Q. Nor at any time prior to January 1st, 1903, when you became a member thereof?

A. No, sir.

Q. You know nothing about whether they met at any particular time or any particular place or whether they transacted any particular business?

A. I do not.

Q. And you do not find in your office a book containing a record of their doings?

A. No, sir.

Q. You don't know whether such a book exists or not?

A. I do not. If you care for it, I inquired whether such a record had been kept prior to the one we now keep.

Q. Well, that would be hearsay?

A. Yes.

HOVEY C. CLARKE, recalled on behalf of the defendant and testifies as follows:

Direct examination.

By Mr. MERRILL:

Q. Mr. Clarke, do you recollect whether or not Mr. Iverson stated to you at the time you were there in 1900, in reference to the permit, that they had no power to extend the permit, do you recall that?

A. There was absolutely nothing said about that.

Q. As you recollect it?

A. As I recollect it.

32 Cross-examination.

By Mr. YOUNG:

Q. Now, Mr. Clarke, you have been in the lumber business for a long time?

A. Yes, sir.

Q. You have annually a great many permits issued by the state during that time and cut timber under permits issued by the state?

A. Yes, sir.

Q. You have had occasion to read these permits haven't you?

A. No; never read a permit in my life.

Q. You never read the permit in controversy?

A. Never.

Q. What made you think it necessary to go to the state auditor to get it extended if you never read it?

A. My attention was brought to it by my timber man.

Q. Did your timber man tell you what was in the permit?

A. No.

Q. What made you think there was anything in the permit then that required it to be returned to the state auditor for any purpose?

A. He said the permit would expire and we——

Q. Who told you that?

A. I said the timber man.

Q. Who is your timber man?

A. I don't remember who was the timber man at that time, but it seems to me it was Mr. Eddy.

Q. Who had the custody of the records of your office?

A. Mr. Eddy.

Q. He kept the records of the office?

A. The timber records, yes.

Q. He kept the permits in his possession, did he?

A. Yes.

Q. You did not keep them?

A. No.

Q. Where did you get this permit at the time you took it to the auditor?

A. He handed it to me.

33 Q. Did you know it had been extended one year before?

A. I think it showed that on the permit.

Q. How is that?

A. I think it showed that on the back of the permit.

Q. Why didn't you read the permit, Mr. Clarke? You are a tolerably intelligent man. You look it?

A. I can't say that I didn't read it.

Q. Were you afraid you would find out it could not be extended if you read it?

A. Why, no.

Q. But you know now, do you, that if you had read it you would have found out that it could not be extended?

A. I don't know what the construction of the law is on that.

Q. You do not?

A. No.

Q. You don't understand the English language? You are quite a literary man, aren't you, Mr. Clarke? You understand the English language pretty well?

(No answer.)

Q. Were you aware that this permit states: "That no extension of the time of this permit will be granted except as provided in Section 24, Chapter 163, General Laws of 1895?"

A. If it is there—I presume it is there—I never read it.

Q. And you didn't look at Section 24, Chapter 163 of the Laws of 1895, to see what its provisions were?

A. I did not.

Q. Why didn't you?

A. Well, I don't read law. I have people hired for that purpose.

Q. Don't you ever read your contracts, Mr. Clarke?

A. Why, yes; I read most of the contracts.

Q. You were engaged in carrying on a business that ran up into the millions annually and you want to tell the court that you carried on that business without reading your contracts or without
34 reading your contracts in relation to the title that you got to timber?

A. I saw very few of the contracts in regard to the title to get the timber. They are passed on by our attorneys.

Q. Mr. Eddy told you this contract was about to expire, you say. What else did Mr. Eddy tell you in relation to it?

A. My recollection is he brought these contracts out and said, "You'd better see the state auditor with reference to the extension of these contracts."

Q. Now, which contracts was it he was referring to when he said they were about to expire, was it the two contracts you have testified about that had not expired and which could legally be extended for one year?

A. There were two that could be extended. I don't know which they were.

Q. I believe you stated in your direct testimony there were two contracts that had not expired by the terms that you presented to the auditor, but could be extended under the law for one year?

A. Yes.

Q. And in addition to those two you had this one with you. Now, what did Mr. Eddy tell you about that contract?

A. I don't think he said anything about it.

Q. Do you know whether Mr. Eddy knew it could not be extended?

A. I suppose he did know.

Q. You suppose he did not know that it could not be extended?

A. No. I supposed he knew what the contents were. He is the man that looked after—

Q. If he knew what the contents were he knew it could not be extended, didn't he, because the contents say it cannot be extended?

Mr. MERRILL: Defendants object to the question on the ground it is incompetent, irrelevant and immaterial.

Question withdrawn.

Mr. YOUNGS

35 Q. Now, then, as I understand you, Mr. Clarke, you want to take the position before the court and have the record show that you did not know the contents of these permits at the time you took them to Mr. Iverson?

A. You asked me if I had ever read the permit. I said I had not.

Q. Did you know the contents of them? Did you know the legal effect of them as to the length of time within which the timber had to be cut?

A. I presume that I knew that the law provided we had three years and this had run three years.

Q. You did know that?

A. I presume I did at the time. I wouldn't say now.

Q. That is, that the whole period allowed by the law had expired?

A. No, I won't say that the whole period allowed by the law had expired because I don't know what the law is in regard to it.

Q. Now, you said a moment ago, you said you presumed you knew that you had three years under the contract?

A. That the permit had run three years.

Q. And that the permit had run three years?

A. Yes, sir.

Q. And of course you don't know what any other member of your corporation knew about what the terms and conditions of the permit were?

A. No. Neither did I know the powers of the timber board.

Q. Now, you were not the one who made the purchase of the timber; that was done by Mr. Shevlin?

A. No. I think he made the purchase.

Q. He made the purchase and caused the permit to be taken out in the name of Mr. Irwin, who was your agent?

A. Yes, sir.

Q. And Mr. Shevlin had been purchasing timber from the state for a great many years?

A. Yes—the company has.

Q. And you want to contradict flatly the statement of Auditor Iverson that he told you that it could be done when you
36 asked him to extend it?

A. I have no recollection of it.

Q. You don't know whether he said it or not, but if he said it you don't remember it; is that the idea?

A. That is the idea, exactly.

Defendants rest.

The court, on the 30th day of April, 1907, made and filed its Findings of Fact and Conclusions of Law and Order for Judgment against each of said defendants in favor of the plaintiff in the sum of \$26,995.17.

DEFENDANTS' EXHIBIT 1.

\$17,144.39

20750.

STATE OF MINNESOTA,
AUDITOR'S OFFICE, ST. PAUL, *May 19, 1904.*

Pay to the State Treasurer seventeen thousand one hundred and forty-four and 39-100 Dollars, for account of Perm. School Fund, \$16,997.19. Revenue Fund (scaling fees) \$147.20. For 2444020 ft. pine timber at \$7.00 per M., cut from S. 16, T. 59, R. 21, Season of 1903-4 under permit No. 358 as per report of S. G. 2nd Dist. April 19, 1904.

S. G. IVERSON, *Auditor.*

To John F. Irwin, Minneapolis, Minn.
No. 54491.

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DEFENDANTS' EXHIBIT 3.

20750.

Stumpage Receipt.

\$17,144.39. TREASURER'S OFFICE, ST. PAUL, *June 2, 1904.*

Received from John F. Irwin seventeen thousand one hundred forty-four 39-100 Dollars, being in full of State Auditor's Draft No. 54491 for Pine Timber cut on Sec. 16, T. 59, R. 21, winter 1903 and 1904 as per report of the Surveyor General 2nd District. Dated 4/19/1904.

Revenue fund, 147.20.

Permanent School Fund, \$16,997.19.

J. H. BLOCK,
State Treasurer. [SEAL.]

June 2, 1904. V. 10112

DEFENDANTS' EXHIBIT 2

is in the same form as Exhibit 3, the descriptions of the land and the amounts being different. The land referred to in Exhibit 2 is not involved in this action.

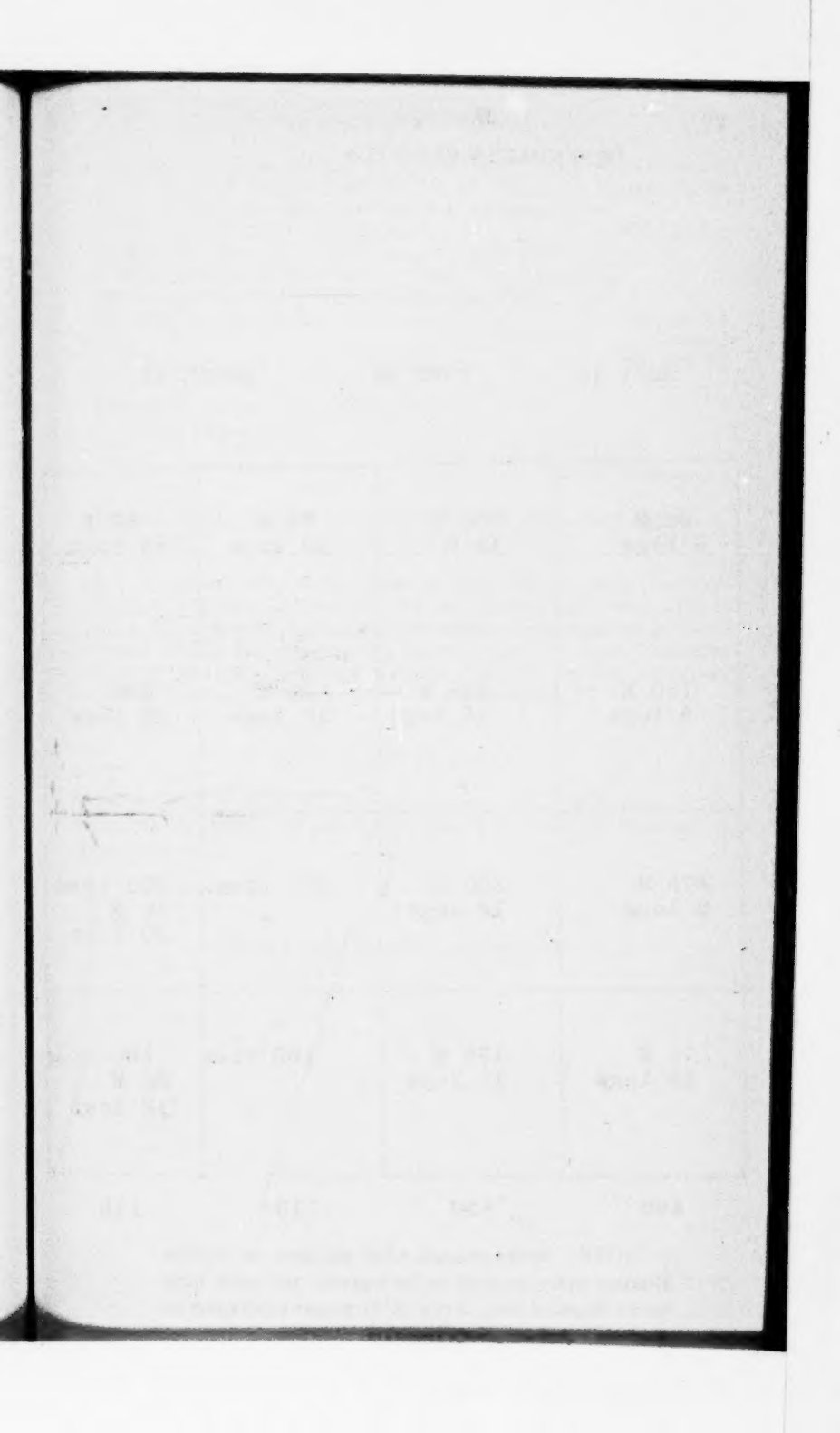
DEFENDANTS' EXHIBIT 4.

20750.

STATE OF MINNESOTA,
TREASURER'S OFFICE, ST. PAUL, *May 25, 1904.*

J. F. Irwin, Minneapolis.

DEAR SIR: The following State Auditor's Drafts drawn against you have been placed in my hands for collection:



DEFENDANTS' EXHIBIT 6.

SEC. 16

TOWN 59

RANGE 21

Land Exam's Rec. No. 2, page 56

90 M 8 logs	100 M 12 M	75 M 12 logs	60 M 13 logs
150 M 8 logs	125 M 12 logs	40 M 12 logs	20M 12 logs
275 M 8 logs	300 M 12 logs	100 ties 12	500 ties 10 M 10 logs
75 M 13 logs	125 M 12 logs	150 ties 12	600 ties 25 M 12 logs
490	650	115	115

NOTE: Trace swamps, roads and lakes on diagram.
 Estimate every 40 acres or lot separate, and mark number of thousand feet, or ties, in its proper subdivision on diagram. Answer every question.

38 State Auditor's Draft No. 54491 being for pine timber cut in 1903-1904 on Section No. 16, Town 59, Range 21, according to report of Surveyor General dated Apr. 19, 1904, amounting to..... \$17,144.39

State Auditor's Draft No. 54492 being for pine timber cut in 1903-1904 on Section No. 36, Town. 59, Range 21, according to report of Surveyor General, Dated April 15, 1904, amounting to..... 22,965.12

Total..... \$40,109.51

Prompt Payment is requested.
Very respectfully,

J. H. BLOCK,
State Treasurer.

Interest will be charged after ten days from date of this notice.
Ck. 32793. Jun- 2 1904. V. 10112.

SEC. 37, Chap. 163, General Laws of 1895.—If the party on whom such draft is drawn shall not pay the same immediately, it shall bear interest at the rate of 8 per cent. per annum from date, and if it is not paid within thirty days (30) from its date the State Treasurer will place the same in the hands of the Attorney General for collection, and he shall proceed forthwith to collect same.

DEFENDANTS' EXHIBIT 5.

Defendants' Exhibit 5 is a certified copy of the field notes of the estimator who made the estimate of the land in controversy and is unimportant.

(Here follows diagram marked p. 39.)

- 40 1. Total No. feet of pine on State Land?
 Ans. 1370 M.
 2. Percentage White?
 Ans. 80.
 3. Percentage Norway?
 Ans. 20.
 4. Quality of Pine?
 Ans. Fair quality.
 5. No. of logs per M?
 Ans. 11.
 6. Appraised value per M?
 Ans. 4.00.
 7. No. tamarack ties?
 Ans. 1550. No. poles? —
 8. Appraised value per tie?
 Ans. 5c.
 9. Distance to haul?
 Ans. 3 miles.
 10. Character of road?
 Ans. Fair.
 11. Give a general description of timber, whether new or old cuttings, etc.
 Ans. New.
 12. Does hardwood grow on this section, and what kind?
 Ans. None of value.
 13. Give specific statement as to liability of loss or damage by fire.
 Ans. Some of the timber on SW $\frac{1}{4}$ is dead.
 Time spent in making above appraisal was days and hours.
 Date of examination Nov. 16, 1897.

JAMES McKENZIE,
State Land Examiner.

(Pine sold 1900.)

STATE OF MINNESOTA,
County of Ramey, ss:

James McKenzie, duly appointed and qualified State Land Examiner, do solemnly swear that the above estimate and appraisal is a true and correct statement according to my best judgment and belief.

JAMES McKENZIE.

Subscribed and sworn to before me this 10th day of Sept., 1900.
 [NOTARIAL SEAL]

W. A. COWING,
Notary Public,
Ramsey County, Minn.

- 41 Sale recommended as necessary to protect the State from loss *htis* 10th day of Sept., 1900.

JOHN LIND, *Governor,*
 AUG. T. KOERNER, *Treasurer,*
 R. C. DUNN, *Land Com'r.*

STATE OF MINNESOTA,
STATE AUDITOR'S OFFICE, ST. PAUL.

I, Samuel G. Iverson, Auditor of State of the State of Minnesota, in whose custody all maps, books and papers relating to any of the lands owned by, or held in trust by, the State of Minnesota are, and by law are required to be kept, do hereby certify that the annexed copy has been by me compared with the original Record of Appraisal in my office as same appears at page 360 of Book B 1, Land Examiner's Report, Estimates and Appraisals, and that said copy is a true and correct transcript of said original record of appraisal, and the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of my office at the Capitol in St. Paul, this 24th day of August, A. D. nineteen hundred six.

SAMUEL G. IVERSON,
State Auditor.

[SEAL.]

I hereby certify, that the foregoing case has been examined by me and found to be conformable to the truth, and to contain
42 all of the evidence offered or introduced on the trial of this cause, and also all objections, rulings, orders, instructions and all other proceedings of such trial, and I hereby settle and allow the same as the Settled Case herein.

Dated Aug. 13, 1907.

J. D. ENSIGN, *Judge.*

(Title of Cause.)

The above entitled case being upon the calendar of said court for the general term thereof commencing on the 7th day of November, 1906, came regularly on for trial before the undersigned, one of the judges of said court, the parties thereto having waived a jury on the 21st day of November, 1906, Edward T. Young, attorney general, and C. S. Jelley, assistant attorney general, appearing as attorneys for the plaintiff and A. Y. Merrill, Clapp & McCartney and H. B. Fryberger appearing as attorneys for the defendants, and the evidence having been introduced and heard, it being conceded by the respective parties that the action is one of the recovery of treble damages for alleged willful trespass upon state lands under Chapter 163, Laws 1895, said case was continued for further hearing and came on for argument before the undersigned, on the 2d day of January, 1907, the same attorneys appearing for and in behalf of the plaintiff and defendants, and after argument, and being sufficiently advised in the premises, the court makes the following

43

Findings of Fact.

I.

That in the winter of the years 1903-4 the plaintiff was the owner in fee of the following described land, to-wit: Section sixteen (16), township fifty-nine (59), range twenty-one (21), county of St. Louis

and state of Minnesota, according to the United States government survey thereof, which land was covered with a heavy growth of pine timber, the property of the plaintiff, and said land was of the class of land owned by the state of Minnesota known in its laws as school land.

II.

That at a sale of pine timber upon said lands, held at the state capitol in the city of St. Paul, state of Minnesota, on the 14th day of November, 1900, the pine timber suitable for saw logs and over 8 inches in diameter—24 feet from the ground, standing, growing or being upon said land, was sold at public auction to the defendant, John F. Irwin, for the agreed price of seven dollars (\$7.00) per thousand feet, board measure, that being the highest bid offered therefor at said sale.

III.

That thereafter a permit to cut and remove said timber was issued to the said John F. Irwin by R. C. Dunn, at that time the auditor and land commissioner of the state of Minnesota, which permit was known and designated as No. 358B, and contained a clause that the said Irwin would pay the state the permit price for all timber remaining standing or remaining cut and not removed from the land after the expiration of the permit, and also contained a clause "that no extension of time of this permit shall be granted except as provided in Section 24, Chapter 163, General Laws 1895," which section provides that no permit shall be issued to cover more than two logging seasons, and no permit shall be extended except by unanimous consent of the board of timber commissioners, and under no circumstances shall an extension be granted for more than one year, and then only for good and sufficient reasons.

IV.

That in buying said timber as aforesaid and in signing said permit, the said defendant, John F. Irwin, acted for himself and also as the agent and representative of the defendant, Shevlin-Carpenter Company, and when said permit was executed, the said John F. Irwin executed and delivered to the state of Minnesota a bond with sureties, as provided for by Chapter 163, Laws 1895.

V.

That on the 7th day of May, 1902, said permit No. 358B was duly extended by the board of timber commissioners for one year from the expiration thereof, or until the first day of June, 1903.

VI.

That at the time said permit was executed, thirteen hundred and seventy dollars (\$1,370.00) was paid by the defendants into the state treasury of the state of Minnesota; that sum being 25 per centum of the appraised value of the timber sold and reported as being on said

and, and which amount Section 23, Chapter 163, Laws 1895, required to be paid at the time of the execution of said permit.

VII.

That in the winter of the years 1903-4 the defendants, acting and co-operating together, knowing that the plaintiff was the owner of said land and the timber thereon, and knowing that there had been one extension of said permit, as required by law, and that said extension had expired on the first day of June, 1903, entered upon said lands and, as admitted by them, cut and removed therefrom 2,444,020 feet of pine timber, which pine timber at the time it was so cut and removed, as stipulated and agreed by the parties in open court when the evidence in said case was taken, was worth and of the reasonable price and value of six dollars (\$6.00) per thousand feet, board measure.

VIII.

That after said timber was cut in the winter of 1903-4 the surveyor general of the second lumber district of the state of Minnesota duly scaled and returned the amount of the same to the auditor of the state of Minnesota, and thereupon said auditor erroneously computed the amount due from the defendants for said timber so cut and removed, as the contract price or stumpage value thereof, as though said permit was still in force, finding the same to be as follows:

Amount paid when permit was executed.....	\$1,370.00
Amount paid by state for scaling.....	147.20
Balance with 8 per cent interest for 1 year.....	16,997.19
	<hr/>
	\$18,514.39

IX.

That thereafter a draft was made upon the defendant John F. Erwin for said scaling fees of one hundred and forty-seven and 20-100 dollars (\$147.20), and said sixteen thousand, nine hundred, ninety-even and 19-100 dollars (\$16,997.19), aggregating the sum of seventeen thousand, one hundred, forty-four and 39-100 dollars (\$17,144.39), making the total amount paid by said defendants, eighteen thousand, five hundred, fourteen and 39-100 dollars (\$18,514.39).

X.

That said sum of eighteen thousand, five hundred, fourteen and 39-100 dollars (\$18,514.39) is still retained by the state of Minnesota, and no part thereof has been repaid to the defendants or either of them.

XI.

That the price and value of said timber, as agreed and stipulated by the respective parties in open court upon the trial of said case, at the time it was cut and removed from said land by the defendants,

being six dollars (\$6.00) per thousand feet board measure, the single value thereof would be fourteen thousand, six hundred, sixty-four and 12-100 dollars (\$14,664.12), and the treble value thereof would be forty-three thousand, nine hundred, ninety-two and 36-100 dollars (\$43,992.36); and the court finds

As Conclusions of Law.

I.

That the timber permit known as No. 358 B expired on the first day of June, 1902, and the extension thereof expired on the first day of June, 1903; that no legal extension thereof could be or was granted beyond said first day of June, 1903, and after said first day of June, 1903, said timber permit was of no effect and absolutely null and void, and was known to be so by the defendants at the time they admit they cut and removed the timber from said lands, to-wit: Section sixteen (16), Township fifty-nine (59), Range twenty-one (21), County of St. Louis and state of Minnesota, according to the United States government survey thereof.

48

II.

That in entering upon said lands and cutting and removing the timber therefrom, as admitted by them, defendants did so without a valid and existing permit for them, or either of them, so to do, and in the winter of the years 1903-4 did willfully, wrongfully and unlawfully enter upon, cut and remove from said lands pine timber belonging to the plaintiff of the reasonable worth and value at the time it was so cut and removed, as admitted by them, of fourteen thousand, six hundred, sixty-four and 12-100 dollars (\$14,664.12).

III.

That the defendants, and each of them, are liable to the plaintiff as and for damages for willfully, wrongfully and unlawfully entering upon said lands and cutting and removing therefrom said timber, for treble the agreed and stipulated value thereof, to-wit: the sum of forty-three thousand, nine hundred, ninety-two and 36-100 dollars (\$43,992.36).

IV.

That while defendants ask in their answer that the whole sum of eighteen thousand, five hundred, fourteen and 39-100 dollars (\$18,514.39), paid by them to the state, be offset against any sum found due to the state, plaintiff in its reply claims the right to apply said money on the claim which it asserts accrued in its favor against the defendants under the terms of the permit No. 358 B, at the time the same expired, for the timber left standing on the land described therein, leaving the state's claim for subsequent trespass committed by the defendant, as above described, wholly unpaid.

But inasmuch as this action was brought to recover for trespass and not to assert any right which the state might have for timber left standing, and inasmuch, also, as the money paid by the defendants after the trespass was committed was paid by them and received by the state on account of the timber that had been cut in the trespass and not in payment for timber left standing when the permit expired, the claim made by the plaintiff in its reply cannot be allowed as to such latter payment; on the contrary the sum paid by defendants to the state on account of the timber cut by them after the permit expired must be deducted from the sum due to the state on account of said trespass, to-wit: the sum of sixteen thousand, nine hundred, ninety-seven and 19-100 dollars (\$16,997.19), should be deducted from forty-three thousand, nine hundred, ninety-two and 36-100 dollars (\$43,992.36), which would leave the balance due the state for the trespass twenty-six thousand, nine hundred, ninety-five and 17-100 dollars (\$26,995.17), for which the defendants, and each of them, are liable.

The sum of thirteen hundred and seventy dollars (\$1370) paid on the day of the execution of the permit was paid as required by law to obtain said permit, and having been so paid is not a proper deduction from the amount due for the willful trespass, nor is the sum of one hundred, forty-seven and 20-100 dollars (\$147.20), paid for scaling fees, a proper deduction inasmuch as that money was paid out by the state on defendants' account and should be repaid by defendants.

50 In accordance with these findings let judgment be entered in favor of the plaintiff and against the defendants, and each of them, for the sum of twenty-six thousand, nine hundred, ninety-five and 17-100 dollars (\$26,995.17).

By the court,

J. D. ENSIGN, *Judge*.

Dated April 29, A. D. 1907.

On motion of defendants proceedings in this case are stayed for forty days from date of order for judgment.

J. D. ENSIGN, *Judge*.

May 1, 1907.

Memorandum.

Willful—willfully—intentionally—knowingly—deliberately—without justifiable excuse—without reasonable ground for believing it to be lawful—an act or omission done on purpose to bring about a certain result.

Was the act of the defendants in cutting the timber in question a willful act?

The defendants had no legal permit to cut the timber. The cutting of the timber without a lawful permit was forbidden by law.

The defendants claimed to have an extended permit which was issued November 14th, 1900, and expired June 1st, 1902, covering the logging seasons of 1900, 1901, 1902, and was under the law extended for one year more or until June 1st, 1903.

51 This permit was in the possession of the defendants and was signed by the proper officers of state and by the agent of the defendant, which showed upon its face that it could not be further extended and referred to the sections of the law which governed the issuance and extension of timber permits.

It is inconceivable that a great corporation engaged in a lumber business of millions of dollars per annum, after the law had been in force for five years and which had made other contracts with the state under the same law, of the same character and containing the same provisions and references, should not know the law and the provisions of its contract.

The evidence of the state auditor is that he told the representative of the defendants that there was no power in the state officers to extend the permit again. This is denied. But the state auditor knew his duty and power under the law and it is quite probable that he would so answer when asked to violate the law; and I assume from the evidence that he so told the representative of the defendants.

This was sufficient notice to the defendants that the permit could be extended. The same notice was contained in the contract between the defendants and the state and reference was made to the statute.

I am at a loss to understand the conversation that occurred between the state officers and Mr. Clarke as to violations of the law that had apparently been sanctioned by the officers of the state, and I do not think it desirable that I should understand it. If others had violated the law it could be no excuse for the defendants for doing so. And if the officers of the state had advised or consented to a violation of the law in the interests of other persons that was no reason why they should again advise, consent or tolerate a violation of the law in favor of the defendants.

52 All of the evidence on the part of the defendants on this branch of the case was objected to on the part of the state and was received subject to the objection; and I have overruled the objections and have considered all of such evidence offered by the defendant.

If what the state officers, without any authority of law, told the representative of the defendants is a defense to the charge of willful cutting of timber, then willful conduct in either civil or criminal cases is easily defended.

Neither the state auditor nor the timber board had authority to curtail, extend or enlarge any of the provisions of the law in relation to the extension of the permit in question. These officers were the instruments for the enforcement of the law, not to abrogate any single provision of the law.

The defendants are presumed to know the law. They made and signed the contract with the state and were presumed to know the provisions of that contract and of the statute referred to in that contract.

The words of any of the state officers consenting to or tolerating or assenting to an evasion of the statute were of no more effect than like words of any private individual that the representative of the

defendants might meet in the capitol or on the street. One had as much authority to consent to a violation of the law as the other.

The law does not constitute the timber board a tribunal to adjudicate upon the legality of an extension of a timber permit beyond the time fixed by the law and any opinion expressed by them or either of them, or any act done by them, without authority of law, is entitled to just as much and no more weight than that of any other citizen.

The supreme court has said: "The state is possessed of large tracts of timber land of incalculable value upon which designing persons have persistently trespassed, cutting and removing therefrom valuable pine timber. The state through its officers has been confronted with difficulties in detecting the guilty parties and bringing them to justice and has been defrauded and robbed of large sums of money by their acts. It was finally thought necessary to enact a very stringent law to prevent future trespass and the drastic act under consideration was the result."

This stringent and drastic act cannot be enforced against a willful trespasser if the accused can be absolved by a showing that, after the notice mentioned, some one told him he might commit the trespass. If this should be held to be the law a willful act under the law could be difficult to prove.

I have not arrived at the opinion here expressed without hesitation. The defendants knew or ought to have known that this act was unlawful. I cannot hold it to be a casual or involuntary act. And if I am wrong in my conclusions there is a tribunal that will correct the wrong.

Filed in my office at — o'clock — m.
April 30, 1907.

J. P. JOHNSON,
Clerk District Court,
By J. S. MOODY, *Deputy.*

STATE OF MINNESOTA,
County of St. Louis, ss:

District Court, Eleventh Judicial District.

I, J. P. Johnson, Clerk of the District Court, St. Louis County, and State of Minnesota, do hereby certify that I have compared the foregoing papers writing with the original findings of fact and conclusions of law in the action therein entitled, now remaining of record in my office, and that the same is a true and correct copy and transcript of said original findings of fact and conclusions of law and the whole thereof.

Witness my hand and seal of said court, at Duluth, this 5th day of July, A. D. 1907.

[SEAL.]

J. P. JOHNSON, *Clerk,*
By ALFRED F. MUELLEWEISS,
Deputy Clerk.

(Title of Cause.)

This cause having been regularly placed upon the calendar of the above named court for the January, A. D. 1907, general term thereof, came on for trial before the court on the 3d day of January, A. D. 1907, and the court, after hearing the evidence adduced at said trial and being fully advised in the premises, did on the 29th day of April, A. D. 1907, duly make and file its findings and order for judgment herein.

Now pursuant to said findings and on motion of Edward T. Young, attorney for plaintiff, it is hereby adjudged that the plaintiff recover of the defendants, and each of them, the sum of twenty-seven thousand, five hundred and thirty-five and 7-100 (\$27,535.07) dollars, the amount of said findings and interest to date hereof, together with eighteen and 00-100 dollars, costs and disbursements as taxed and allowed, amounting in all to the sum of twenty-seven thousand, five hundred, fifty-three and 07-100 (\$27,553.07) dollars.

Witness the Honorable J. D. Ensign, judge of the district court aforesaid, at Duluth, this 4th day of September, in the year 55 of our Lord, One Thousand Nine Hundred and Seven.

[SEAL.]

J. P. JOHNSON, Clerk,

By V. A. DASH, Deputy Clerk.

(Title of Cause.)

To Hon. E. T. Young and C. S. Jelley, attorney- for the above named plaintiff, and to J. P. Johnson, Esq., clerk of said district court:

Please Take Notice, that the above named Shevlin-Carpenter Company, a corporation, and John F. Irwin, appeal to the supreme court of the State of Minnesota from that certain judgment of the said District Court entered herein on the 4th day of September, A. D. 1907, and from the whole thereof.

Dated this 7th day of September, A. D. 1907.

CLAPP & MACARTNEY AND

A. Y. MERRILL AND

R. J. POWELL,

Attorneys for Defendants.

Supersedeas bond on appeal duly approved, served and filed.

56 STATE OF MINNESOTA,

Supreme Court, October Term, A. D. 1907.

15480.

No. 25.

STATE OF MINNESOTA, Respondent,
v.
SHEVLIN-CARPENTER COMPANY, Appellant.

Syllabus.

1. Chapter 163, Laws 1895, which subjects a trespasser upon state timber lands to damages in double or treble the value of the timber taken, is not in conflict with the state or federal constitutions. *State v. Shevlin-Carpenter*, 99 Minn. 158.
2. A permit to remove timber purchased from the state, at a public sale, is limited in the first instance by §24, c. 163, Laws 1895, to the period of two logging seasons, with authority in the timber commission, for good and sufficient reasons, to grant one extension, and that for the further period of one year only.
3. It conclusively appears from the evidence that the timber in question was cut and removed by appellant after its permit had expired and that the taking was without authority of law.
4. The state is not estopped, in a civil action, to recover double the amount of value of timber taken by reason of the fact that the land commissioner gave appellant to understand that a further extension of the permit would be granted, and by reason of the fact that appellant proceeded in good faith, and the state caused the timber to be scaled, received payment therefor, with interest, and retained the same.
5. The finding of the trial court that the trespass was willful is not sustained by the evidence.
6. It conclusively appears from the evidence that the trespass was inadvertently committed in good faith, upon the supposition that authority of the state had been granted.
7. Judgment affirmed in all respects, except that the amount thereof is reduced to double the value of the timber.

58 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1907.

15480.

No. 25.

STATE OF MINNESOTA, Respondent,
v.
SHEVLIN-CARPENTER COMPANY, Appellant.

Opinion.

Action by the state for the purpose of recovering treble damages from appellants for the willful and unlawful cutting and removing from state lands, 2,444,020 feet of timber. Appellant Company answered and admitted the cutting and removal of the timber; justified the same under a scale and permit to J. F. Irwin, its representative; denied that the timber was cut and removed willfully and unlawfully; alleged payment in full and specially pleaded the unconstitutionality of c. 163 of the General Laws 1895, under which the state seeks to recover. On a former appeal, upon demurrer to the complaint, *State v. Shevlin-Carpenter Company*, 99 Minn. 158, the constitutional questions were raised, and it was there held that the act was constitutional and that in case of trespass the state might recover either the double value of the property taken, or treble its value, according to whether the facts constituted a casual or involuntary, or a willful and unlawful trespass. We adhere to that decision, and for the reasons set forth in the opinion then filed.

Upon trial on the merits the trial court found that on November 14, 1900, the state sold the John F. Irwin, appellant's representative, the pine timber involved in this action, for the agreed price of \$7 per thousand feet, board measure; that on November 14, 1900, permit No. 358-B was issued to Mr. Irwin by the land commissioners, authorizing him to cut and remove the timber so purchased during the logging seasons 1900, '01 and '02; that the permit expired June 1, 1902, and was extended to June 1, 1903; that at the time the permit was issued, appellant company paid into the state treasury the sum of \$1370., being 25% of the appraised value of the timber sold, as provided by §23, c. 163, Laws 1895; that in the winter of 1903-04, and after the extension above mentioned had expired, appellant company willfully and unlawfully cut and removed the timber in question; that after the timber was cut the surveyor general duly scaled and returned the amount of the timber so cut and removed to the land commissioner, who thereupon computed the total amount due to be \$18,514.39; that a draft was drawn on Mr. Irwin for that amount, which included the surveyor general's scaling fees of \$147.20, and interest on the purchase price at the rate of 8% for one year; the draft was duly paid; the state received and still retains the amount. The court also found that the

value of the timber taken was \$3. per thousand feet, board measure, and that the single value thereof was \$14,664.12, but ordered judgment to be entered for treble that amount, less a credit of \$16,997.19, and judgment was accordingly entered for the sum of \$26,995.17.

There are two questions before the court; (1) Did appellant make out its defense that the timber was lawfully cut and removed, and was paid for in full? (2) If the evidence fails to sustain that position and warrants the conclusion that the timber was cut and removed without authority of law, then was it taken under such circumstances as to warrant the state in recovering as for a willful and unlawful trespass, or was the act of cutting and removing
60 the timber of such a character as to bring it within the provisions of the statute, viz.: a casual or involuntary trespass?

1. Under the provisions of §11, c. 163, Laws 1895, the state land commissioner is authorized to sell the pine timber of the state when the same is liable to waste, and not otherwise; and it is provided that when a sale of timber is made the commissioner shall execute a permit to enter upon the land for the purpose of cutting and removing it, and before any permit shall be granted the timber shall be estimated and appraised. The act provides that the commissioners of appraisement shall be appointed by the land commissioner, and there are elaborate provisions regulating the estimators and the method of scaling the timber. By §18 a timber commission is established, consisting of the land commissioner, the governor and state treasurer, and it is made the duty of that commission to determine whether or not any timber belonging to the state is subject to sale, and the board shall determine whether a sale is for the best interests of the state and necessary in order to protect the state from loss. Section 23 covers the question of permits, and the land commissioner is authorized to issue a permit in such form as the attorney general of the state may prescribe, authorizing the purchaser of timber to enter upon and cut and remove the same from the land. The permit is issued, signed and sealed by the commissioner. The act provides that the permit shall be dated as of its true date, and shall state the time of its expiration, and that it cannot be extended except as provided in §24 of the act, which provides that no permit shall cover
61 more than two logging seasons, and that no permit shall be extended except by the unanimous consent of the board of timber commissioners, and under no circumstances shall an extension be granted for more than one year, and then only for good and sufficient reasons.

The permit involved in this case, as already stated, was issued November 14, 1900, and expired June 1, 1902. It bears the endorsement of an extension until June 1, 1903, on account of winter breaking up so early, and was signed by all the members of the timber commission. Mr. Clarke, a witness on behalf of appellant, testified that he was informed by one of appellant's clerks that there were some permits for the cutting and removing of timber which were expiring and needed to be looked after; that he took the same and called on the state auditor and handed him the permits; that the auditor said he thought there would be no trouble about getting

two of them extended as they had run but two years, but that the third—the one in question—would have to come before the state timber board; that there were a number of permits in the same shape and they would have to be passed upon by the state timber board as to extension; that word was received later at the Shevlin-Carpenter Company's office that the timber board had passed on the extension and that appellant was allowed to go on and cut the timber by paying the amount stated in the permit, with an additional eight per cent. per annum for one year from the time of the extension; that accordingly appellant went on and cut the timber in the ordinary course of business, the surveyor's scale showing the amount cut; that the state auditor made draft on appellant for the amount, plus interest and scaling charges, less the amount paid in, some \$1,350.; that

62 appellant paid the sum to the state treasurer and received his receipt therefor. The witness further testified that appellant acted in good faith, believing it had a perfect right under the permit to cut and remove the timber. The state auditor was called as a witness (on behalf of respondent), admitted that he had a conversation in his office with Mr. Clarke regarding the permit in question, and testified: "Mr. Clarke called in connection—to inquire about the condition of this permit which he had, one of them being the one in question, and stated that they had been unable to cut it during the life of the permit. And he wanted to know what could be done with it. I explained to Mr. Clarke that under the law I had no authority to grant that extension. But I called his attention, however, to what had taken place regarding some other permits which were similarly situated; that they were about to expire, or had expired and that the timber board, consisting of the governor, state treasurer and the state auditor, had heard the statement of the parties interested and had practically consented to permit them to cut that timber the succeeding year on condition that they would pay 8% interest. * * * And I stated to Mr. Clarke that inasmuch as he appeared to have as good a reason for asking it as they had that we should treat him just the same as we had agreed to treat the others. * * * And whether or not that was afterwards submitted to the timber board, I am not clear and I won't be able to state positively. But it seems quite reasonable that at some later time I did call that matter to the attention of the timber board and stated to them that there were other permits similarly situated to the ones that had been acted upon specifically by the board. And there were others besides Mr. Clarke's. And I stated that I thought we

63 would have to treat all alike. We would not give a concession to one and refuse it to another." The witness also stated that he had made an examination of the files of the office for records of the meeting of the timber commission, but found none prior to January 1, 1901, and had no personal recollection whether or not a meeting had taken place with respect to this permit. On cross-examination the state's counsel asked the auditor the following question: "Q. And at that time you knew it was beyond the power of yourself as state auditor, also beyond the power of the timber board of which you were a member, to extend that permit any

further, did you not? A. I did. Q. And you told Mr. Clarke that fact, did you not? A. That is my recollection of it, yes sir." On redirect examination Mr. Clarke testified that there was nothing said about the lack of power to extend the permit. That portion of §24 which confers authority to make a second extension reads as follows: "No permit shall be extended except by unanimous consent of the board of timber commission, and under no circumstances shall an extension be granted for more than one year, and then only for good and sufficient reasons. In case an extension is granted a log mark shall be agreed upon for the third season."

Appellant submits that the authority to make an extension is not necessarily limited to the period of one year, and that when considered in connection with the entire act, the language fairly means that other extensions can be made but only for one year at a time. The argument on this point is based on the evident purpose of the entire act, viz.: to protect the timber lands of the state from waste, and that the same are to be sold only at public sale after an appraisalment. It is argued that when a permit is about to expire, if nothing is to be accomplished by having another public sale, then there is no reason why an additional extension for another

64 year might not be granted so as to allow the timber to be removed under the original sale. We are unable to accept this interpretation of the statute. To our mind it is clear that it was the intention to limit the power of the timber commission to one extension of one year only. The result in such case being, that if the timber is not cut and removed within the additional year the state must begin *de novo*, and have a new appraisalment and public sale. It is further claimed that, conceding the second extension was invalid for want of authority under the law to grant it, yet the state officers, having construed the act to the contrary and having assumed to proceed within their legal rights, having permitted appellant to go upon the land and cut and remove the timber, having caused the timber to be scaled and having received the amount of the value according to the scale and purchase price, together with 8% interest during the year of extension, that the state is estopped from denying the validity of the transaction and should not be permitted to recover even the double value in damages.

Conceding that appellant and its representatives, were acting in good faith, we are satisfied that under the circumstances of this case appellant is not in a position to urge that defense. Estoppels against the state are not favored and do not arise from the negligence of its officers, since those who deal with an officer of the state are bound to know the extent of his power and authority. *Filor v. U. S.*, 9 Wal. 45; *Pulaski County v. State*, 42, Ark. 118; *Salem Imp. Co. v. McCourt*, 26 Oregon 93; *State ex rel Lott v. Brewer*, 64 Ala. 287. However in the second proviso of §37 of the act in question, it is declared that the state shall not be estopped to recover the value of its timber by the acts of its officers in receiving payment therefor. By this language the legislature intended

65 to remove any doubt upon the question of estoppel when timber is taken contrary to law. Although the parties are

mistaken as to their rights and proceed in good faith, honesty of purpose cannot constitute a complete defense where the taking is unlawful. The provisions of c. 163 are plain upon this subject, and the parties are bound to know the law.

2. As already stated, appellant proceeded to cut and remove the timber in the same manner as if an actual legal extension had been granted. That is to say, appellant openly went on the land and did the cutting, immediately notified the proper officers, and the sealing was made, the estimate thereof sent to the state auditor, a bill of the proper amount rendered, with 8% interest added, and a draft drawn on appellant's representative Mr. Irwin, in whose name the permit was issued, which was paid to the state and the money retained by it. It is clear that the state auditor, and state treasurer proceeded in good faith and acted upon the theory that an extension of the permit had been granted, and that appellant was authorized to cut and remove the timber under and by virtue of such extension. The proper officer was notified to scale the logs in pursuance of such understanding, and the bill was made out in the auditor's office. The draft itself, upon its face, indicates that it was pursuant to the authority conferred by permit No. 358-B, and the treasurer's receipt for the money refers to the particular draft drawn by the auditor. The state takes the position that this evidence justified the trial court in finding that the trespass was willful; that appellant was bound to know the law and must take the utmost penalty for violation thereof. Is this position equitable

and sound? A decision of this question does not depend
66 altogether on the strict legal rights of the parties as to the title of the timber cut and removed. We are dealing here with the question of intention and good faith. The representations made to appellant's representative were equivalent to informing him that unless advised to the contrary, he might consider that the application to extend the permit was granted. In view of these admissions, although the auditor stated his own want of power, he could not at the same time have stated to Mr. Clarke that such extension could not legally be granted by the timber commission, for the two statements are absolutely contradictory and cannot be reconciled. The auditor, as land commissioner, conducted the negotiations upon the theory that the timber commission possessed such authority, and said that such extension had been granted to others similarly situated, and that they would treat this particular permit in the same manner. This is admitted, and if true, then there was no occasion for making the declaration that they were without authority to act. Although the witness made an affirmative answer to the question asked by the state's counsel on cross-examination, we must assume that such answer was made inadvertently.

The state's position rests upon the assumption that a party commits willful trespass simply because he is charged with knowledge of the law. But where the question of intention enters into the essence of the offense, the presumption that the act was willfully performed may be rebutted, and the burden is upon appellant to affirmatively show that it was not guilty of intentional wrong doing. *Karsen v. M. & St. P. Ry. Co.*, 29 Minn. 12.

The act in question very wisely makes a distinction between trespasses committed inadvertently and those committed willfully.

67 The definition of "casual and inadvertent" should not be restricted. The words are intended, as used in c. 163, to convey the idea that when an illegal cutting of state timber lacks the elements of willfulness and intention, then the damage shall be double the value only. One who, through mistake or inadvertence, passes beyond his own boundary line and cuts and carries away timber of another, is not guilty of willful trespass. *Batchelder v. Kelly*, 31, Am. Dec. 174. Willful in the present case is not determined by the mere fact that appellant knowingly and purposely entered upon the land in question and cut and removed the state's timber therefrom. Of course, its action in that respect was the result of a fixed purpose so to do. To determine what is meant by willful, we must ascertain the purpose with which the act was performed. Did appellant intend to commit a wrong against the state, and to appropriate the timber without regard to the rights of the state? In the case of the *United States v. Homestake Mining Co.*, 117 Fed. 461, defendant justified the trespass upon the ground that it had been informed by the secretary of the interior that certain timber might be taken from the forest reserve land until further notified. It turned out that although no authority was conferred for the taking of the timber, the court held that the parties acted in good faith in relying on such promise. The court pertinently remarked, that if the presumption that a party was charged with knowledge of the law made every trespasser a willful and intentional wrong doer, then there never would be a trespasser through inadvertence or mistake, or one who violates the law in the honest belief that he is acting within his legal rights. In the case of *King v. Merriam*, 38 Minn. 47, it was held that in an action for the value of timber cut and carried away from the land of another, if defendant was an unintentional and mistaken trespasser, or honestly and reasonably believed that his conduct was rightful, the measure of damages was the value of the timber at the time it was taken. In *State v. Shevlin-Carpenter Company*, 62 Minn. 99, timber was cut and removed under a void permit, but it was held proper, nevertheless, to determine whether the trespass was willful or in good faith, in arriving at the proper basis of damages in a replevin action. That case would seem to be good authority for the rule that an illegal taking of the state timber is not necessarily a willful trespass.

68 The record of this case forces one of two conclusions: Either both parties, appellants and the representatives of the state, were acting in good faith, or, appellant, knowing better, purposely took advantage of the state and deliberately, willfully and fraudulently cut the timber. Such willful and fraudulent purposes cannot reasonably be inferred from appellant's conduct, and is not justified under the evidence by the mere fact that its officers and representatives were charged with knowledge of the law. The finding of the trial court that appellant was guilty of a willful trespass, is not sustained by the evidence. On the contrary, the record conclusively shows that

appellant had reasonable ground for believing authority had been granted and honestly acted on such belief.

The court found that the amount of timber taken by appellant was 2,444,020 feet, and that its value was \$6 per thousand feet, board measure, making a total of \$14,664.12. Being of opinion that, in this action, the state is limited to a recovery of double damages, and the timber cut having been paid for, the judgment is necessarily to the value as found.

69 Remanded, with directions to reduce the amount of the judgment to \$14,664.12. In all other respects, judgment is affirmed.

LEWIS, J.

70 I dissent. The controlling question in this case is one of fact, namely: Did the defendants willfully cut and remove the timber in question? The trial court found as a fact that they did so cut and remove the timber. The majority opinion holds "that it conclusively appears that the trespass was inadvertently committed in good faith upon the supposition that authority of the state had been granted." If this be true, then, the finding of the learned trial judge was made without any evidence whatsoever to support it. It is not a question of the preponderance of the evidence but whether the record discloses any evidence fairly tending to support the finding. The conclusion which I draw from the record is that the evidence not only supports the finding within the rule, but that it is difficult to see how the trial judge, upon the evidence, could come to any other conclusion than the one reached by him.

In considering the question whether the evidence supports the finding we must assume that the representative of the defendants was informed by the state auditor to the effect that neither he nor the timber board had any power to extend the permit, for the credibility of the witnesses was a question for the trial judge, and his memorandum shows that he accepted the testimony of the auditor as true. It was not necessary to make a special finding of such evidentiary fact, for only the ultimate facts found are to be stated in the findings.

The permit under which the defendants attempt to excuse their acts expressly provided that there could be no extension of the time limit of the permit except as provided in §24, ch. 163, Gen. Laws 1895, which, in language so terse and so clear that no intelligent man could fail to understand it, forbade the extension of the

71 permit, under any circumstances, for more than one year, and then only for good and sufficient reasons. It is an admitted fact in this case that there was one extension of the permit which had expired before the trespass was committed. We have, then, a case where the defendants' permit, and the statute therein referred to, showed on its face that it could not then be extended under any circumstances; and further, that the defendants were told by the state auditor that no state official or board had any power to extend the permit. And yet, with knowledge that their permit had expired and that the law forbade its renewal, the defendants

deliberately went upon the land of the state, cut and carried away its timber thereon. They seek to mitigate this act, and to establish that the trespass was not willful, within the meaning of the statute, by evidence tending to show that the state officers having charge of its public lands had granted extensions of permits for a longer time than one year to other parties; that they permitted the defendants to go upon the land and cut and remove the timber, caused it to be scaled and received from the defendants the purchase price therefor, with interest, during the year for which they understood the permit had been extended. If this were a case between private parties, the facts which such evidence tends to prove could be invoked as an estoppel against any claim of damages for a willful trespass. They are, however, of no avail against the state. The evidence in this case tending to show either a violation of the law or a lax enforcement of it by public officers does not, in my opinion, establish the good faith of the defendants in the premises.

START, C. J.

72 [Endorsed:] No. 15480. State of Minnesota, Supreme Court. State of Minnesota, Respondent, vs. Shevlin-Carpenter Company, Appellant. Opinion and Syllabus. Filed Nov. 1st, 1907. C. A. Pidgeon, Clerk. October Term, A. D. 1907. Lewis, J.

73 STATE OF MINNESOTA:

In Supreme Court, October Term, A. D. 1907.

STATE OF MINNESOTA, Respondent,

vs.

SHEVLIN-CARPENTER COMPANY, a Corporation, and JOHN F. IRWIN, Appellants.

Petition for Rehearing.

In the above entitled action the State respectfully petitions for a rehearing, for the reason that, in its opinion, the decision in said action is contrary to the terms of, and would nullify the State timber law.

The court finds, adhering to its former opinion in this case:

(1) That the law under which the action was brought is valid in all particulars.

(2) That a valid permit was duly issued to the defendant; that it had been lawfully extended for one year beyond the time for which it was originally issued, and that no State officer had any power to extend it for any further time.

(3) That the timber involved was cut and removed by defendant, after the permit as so extended had expired, so that when the timber was cut the relation of the defendant to the State was the same as if no permit had ever existed.

(4) That there was no authority of law for the cutting and taking of the timber by defendants.

74 (5) That under the rule of law a State is not estopped by the unauthorized acts of its officers, because every one dealing with a State officer is bound to know the extent of his authority. That in this case, by the second proviso of Section 37 of the Timber Act, it is expressly declared that the State shall not be estopped from recovering in a trespass action by any unauthorized act of a State officer in collecting less than the amount due under the law.

(6) That all persons are presumed to know the law, and the contents of their contracts, and that the permit involved declared on its face that it could not be extended for longer than one year.

This correct statement of the law and the facts in this case, it seems to us, makes a decision in favor of the State's contention absolutely necessary. With the foregoing propositions found against it, there is no hypothesis upon which defendants can win. Departing from the foregoing principles the Court says:—

"A decision of this question does not depend altogether on the strict legal rights of the parties, as to the title of the timber cut and removed. We are dealing here with the question of intention and good faith. *The representations made to appellants' representative were equivalent to informing him that unless advised to the contrary he might consider that the application to extend the permit was granted.*"

How can this rule of decision be reconciled with the portions of the foregoing findings, which for convenience I have marked propositions numbered 5 and 6?

The permit in this case had expired as the defendants knew. It could not be revived or extended by anybody, as the defendants knew. It knew these things because it is conclusively presumed to know the law, and because the permit so stated on its face. The defendant also knew it as a fact because it had been dealing in these permits for years as Clarke testified. The officers of the State certainly knew it; they were charged with the administration of the law and the Auditor swore they knew it and even that he told the defendant so. The Auditor was the defendant's witness, not ours, as the Court assumes.

75 The question, however, as to whether the Auditor told Clarke the permit could not be extended is wholly immaterial. It would not make defendant's knowledge on the subject more complete to have been told by the State Auditor what it already knew, but the only evidence in the case on the subject is to the effect that *it was so told*. Not a letter of the void permit was ever changed by anybody. No meeting of the Timber Board was ever held to consider it. Not a word of evidence was introduced to show that the Timber Board ever assumed to extend this or *any other permit* by "unanimous action" or otherwise. It cannot be claimed that a State officer exceeding his authority can deceive another who knows his want of authority. The State cannot be deprived of its property by such a transaction.

The Auditor testified that the Timber Board had some other expired permits before them which they had "practically" agreed to

end. It does not appear whether they ever got over the line and actually undertook to extend them or not. There certainly is no presumption that they became parties to the larceny of the State's timber by any such act. The presumption is that they did not violate their trust. If the question whether they did or not was important or material, the violation should be shown by clear testimony and not left to speculation or inference. But if they violated their duty and became parties to the wrongdoing, it did not affect the rights of the State, and therefore what was said was immaterial. The defendant had no more right than if a permit had never been issued.

The fact that State officers took *part* of the amount due from these parties in ostensible settlement, does not injure the defendant because he gets credit for what was paid. It was just such acts that are guarded against by the provision of the statute to the effect that a wrongful act of a State officer should estop the State.

The Court cites the case of *State vs. Shevlin-Carpenter*, 62 Minn. an authority, but seems to overlook the fact that that case was decided before this law took effect, and that the rule there laid down is entirely abrogated by the terms of this law. There is no room for speculation as to what the rule should be when the statute lays down the rule, and this Court has said that the statute is valid.

In the case quoted from the Federal Reporter, no written permit is necessary and consent of the Secretary, who has autocratic power, is shown.

The Court further says:—

"The State's position rests upon the assumption that a party commits wilful trespass simply because he is charged with knowledge of the law. But where the question of *intention* enters into the essence of the offense, the presumption that the act was wilfully performed may be rebutted, and the burden is upon appellants to affirmatively show that it was *not guilty of wrongdoing*. The act in question very wisely makes a distinction between trespasses committed *inadvertently* and these committed wilfully. The definition 'casual and inadvertent' should not be restricted. The words are intended *as used* in Chapter 163 to convey the idea that when an alleged cutting of timber lacks the elements of wilfulness and intention, then the damages shall be double the value only."

The words "casual and inadvertent" are not used in the Act at all. The words used are "casual and involuntary" which have a different meaning. To be *involuntary*, the trespass must be unintentional. Trespasses are either intentional or unintentional. There is no middle ground, and no other classification. The penalty prescribed for one kind of trespass cannot be applied to the other. For an unintentional or accidental trespass, such as mistakenly getting over the line, the damages are double value. There is no such question in this case. If this was a trespass at all, it was intentional, in which we would be entitled to recover treble damages. If it was not a trespass we are not entitled to anything.

The Court is entirely mistaken if it believes that there was any

particular openness and notoriety about the manner in which the property in this case was taken, that would distinguish it from any other case where timber belonging to the State is taken contrary to law. The mere fact that the timber cut was scaled by the Surveyor General has no bearing on the question. The Surveyor General is called upon by lumbermen to scale both State timber and private timber, whether purchased or stolen, and although he is a State officer, he is, in relation to the scaling of timber, a mere servant of the lumberman, and is not in any manner connected with the department that has charge of the disposition of the public lands. The cruisers and estimators in the employ of the State Auditor are entirely distinct from, and have no connection with the office of the Surveyor General. He is not sent by the State to do the scaling.

It is entirely clear, also, that the modification of the judgment directed by the Court is erroneous, even upon the theory on which the Court proceeded, because if the only recovery the State was entitled to was double the value of the timber, such double value must be taken, and the amount which the defendants have paid be deducted therefrom, which would greatly reduce the judgment as directed by this Court, and place the amount recovered by the State many thousand dollars below what the defendants offered to pay before the suit was tried, and which the State officers refused to take because they had no authority to take less than treble damages.

If the decision as rendered by the Court in this case is to stand, does it not, and will it not, result in the Court giving judicial sanction and approval to the following propositions:

I.

That though Chapter 163, Laws 1895 expressly provides that under no circumstances shall a timber permit be extended for more than one year, and then only by the unanimous consent of the Timber Board, still after such extension, either the State Auditor or the Timber Board can extend the permit indefinitely from year to year, and a person who professes to have such an extension, can go upon State land and cut and remove timber therefrom within any time which may be given him by the State Auditor or the Timber Board.

II.

That if a person be given permission by the State Auditor or Timber Board to enter upon State land and cut and remove timber therefrom after his permit has expired, and the State sues such person for trespass, he can plead such permission to show his good faith and the State, under such circumstances, cannot recover treble damages.

79

III.

That if, under such circumstances, a person cuts and removes timber from State land, it will be impossible for the State to ever recover treble damages for trespass under the statute, and the decision is a

virtual repeal of the statute as to the rights of the State in that regard.

(Signed)

E. T. YOUNG,
Attorney General,

(Signed)

C. S. JELLEY,
Assistant Att'y General,
Attorneys for Respondent.

11-8-07

80 [Endorsed:] 15480. Original. State of Minnesota. In Supreme Court, October Term, 1907. State of Minnesota, Respondent, vs. Shevlin-Carpenter Co., et al., Appellants. Petition for Rehearing. (Endorsed) Filed Nov. 9, 1907. C. A. Pidgeon, Clerk.

81 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1907.

15480.

No. 25.

STATE OF MINNESOTA, Respondent,

v.

SHEVLIN-CARPENTER COMPANY and JOHN F. IRWIN, Appellants.

This case having been reargued and fully considered, the former decision is adhered to.

By the COURT:

I am of the opinion that the former decision should be adhered to, and merely add the statement that the case rests upon its own particular facts. It is not held that the state auditor or timber board can expressly or by implication waive the rights of the state or protect a trespasser from the penalty imposed by the statute.

ELLIOTT, J.

I concur in the dissent of the Chief Justice. It is clear to me, in view of the express statutory restrictions upon the subject involved in this case, that neither the state auditor nor the state timber board had authority expressly to waive the rights of the state, and if they could not do so by affirmative action, *a fortiori*, their silent acquiescence in the commission of or settlement for other trespasses by defendant or others, would furnish defendant no protection for the trespass here complained of. The rights and liabilities of the parties are clearly and specifically defined by statute, by which the court is controlled. The judgment should be affirmed.

BROWN, J.

83 [Endorsed:] No. 15480. State of Minnesota, Supreme Court. State of Minnesota, Respondent, vs. Shevlin-Carpenter Company and John F. Irwin, Appellants. Opinion and Syllabus. Filed Jan 24th, 1908. C. A. Pidgeon, Clerk. October Term, A. D. 1907. Per Curiam, J.

84 STATE OF MINNESOTA:

Supreme Court, General October Term, A. D. 1907.

MONDAY MORNING, 9:30 o'clock, October 14, A. D. 1907.

Court convened pursuant to adjournment. All the Justices being present.

Reg. No., 15480; Cal. No., 25.

STATE OF MINNESOTA, Respondent,
vs.

SHEVLIN-CARPENTER COMPANY and JOHN F. IRWIN, Appellants.

This cause came on to be heard this day upon the return to the appeal herein.

Thereupon the same was argued by counsel, submitted to the court for decision and taken under advisement.

A true record.

Attest:

C. A. PIDGEON, *Clerk*,

The foregoing is a full and true copy of the Minutes of Argument in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk*.

By I. A. CASWELL, *Deputy*.

85 [Endorsed:] No. 15480. State of Minnesota, Supreme Court. Minutes of Argument. February 14th, A. D. 1908. Signed C. A. Pidgeon, Clerk.

86 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1907.

No. 25.

STATE OF MINNESOTA, Respondent,
vs.

SHEVLIN-CARPENTER COMPANY and JOHN F. IRWIN, Appellants.

Appeal from District Court, Eleventh Judicial District, County of St. Louis.

This cause having been duly argued and submitted at the General October Term of this Court, A. D. 1907, upon the return to the appeal herein.

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the Court below, herein appealed from, be and the same hereby is, modified and the case remanded to the trial court with directions to reduce the amount of the judgment to \$14,664.12; In all other respects, judgment is affirmed, and that the Appellants above named have judgment accordingly.

Entered February 14th, A. D. 1908.

By the Court,

Attest:

C. A. PIDGEON, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original Order for judgment entered in the above entitled cause.

Attest:

C. A. PIDGEON, *Clerk.*

87 [Endorsed:] 15480. State of Minnesota, Supreme Court.
Order for Judgment. February 14th, A. D. 1908. Signed
C. A. Pidgeon, Clerk. Page —.

88 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1907.

No. 25.

STATE OF MINNESOTA, Respondent,

v.

SHEVLIN-CARPENTER COMPANY and JOHN F. IRWIN, Appellants.

Pursuant to an order of Court duly made and entered in this cause on the 14th day of February, A. D. 1908.

It is here and hereby determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court of the Eleventh Judicial District, sitting within and for the County of St. Louis, be and the same hereby is modified and the case remanded to the trial court, with directions to reduce the amount of the judgment to \$14,664.12; in all other respects judgment is affirmed. And it is further determined and adjudged that the Appellants above named, do have and recover of said State of Minnesota, Respondent, herein the sum and amount of One Hundred and seventeen and 20-100 Dollars (\$117.20) costs and disbursements in this cause in this Court, and that said Appellants have execution for the enforcement thereof.

Dated and signed this 14th day of February, A. D. 1908.

By the Court.

Attest:

C. A. PIDGEON, *Clerk.*

Statement for Judgment.

Costs allowed by Statute.....	\$25.00
Clerk's Fees for making Return.....	7.10
Printer's Fees.....	56.60
Clerk's Fees, Supreme Court.....	15.25
Stenographer for Transcript of Case.....	12.50
Affidavits and Acknowledgments.....	.75
Postage.....	

89 [Endorsed:] State of Minnesota, Supreme Court. Transcript of Judgment. Filed, February 14th, A. D. 1908.
Signed C. A. Pidgeon, Clerk. Page No. —. Book —.

90 STATE OF MINNESOTA:
Supreme Court, ss:

I, C. A. Pidgeon, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said Supreme Court at the Capitol, in the city of St. Paul, this 14th day of February, A. D. 1908.
[SEAL.] C. A. PIDGEON, *Clerk.*

91 STATE OF MINNESOTA,
Supreme Court:

STATE OF MINNESOTA,
Office of Clerk of Supreme Court, ss:

I, C. A. Pidgeon, Clerk of the Supreme Court of the State of Minnesota, do hereby, in obedience to the Writ of Error herein issued, certify and return to the Supreme Court of the United States, that the foregoing and annexed transcript of record is a full and complete transcript of the record, judgment, judgment roll and all of the proceedings had in the said Supreme Court of the State of Minnesota, in the case between The State — Minnesota, Respondent, vs. Shevlin-Carpenter Company, and John F. Irwin, Appellants, including the opinions of the said Supreme Court therein, as appears from the original files and records;

And I do further certify and return that I have annexed to said transcript and included therewith, and that the foregoing are copies, of the petition for Writ of Error, with allowance of the same, of the assignment of errors and petition for reversal and order granting supersedeas, and of the supersedeas undertaking, as the same remain on file and of record in said Supreme Court of the State of Minnesota, and also the original Writ of Error from the Supreme Court of the United States and the citation issued thereon, with proof of service

thereof thereon and on each of the same endorsed, and that the foregoing constitutes a true, full, and complete return to said Writ of Error.

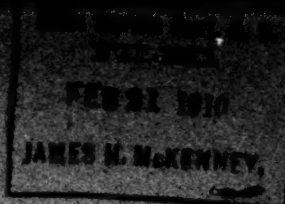
In witness whereof I have hereunto set my hand and the seal of the said Supreme Court of the State of Minnesota, at the Capitol at St. Paul, Minnesota, this 14th day of April, A. D. 1908.

[Seal of the Supreme Court of the State of Minnesota.]

C. A. PIDGEON,

Clerk of the Supreme Court of Minnesota.

Endorsed on cover: File No. 21,137. Minnesota Supreme Court. Term No. 139. Shevlin-Carpenter Company and John F. Irwin, plaintiffs in error, vs. The State of Minnesota. Filed April 25, 1908. File No. 21,137.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

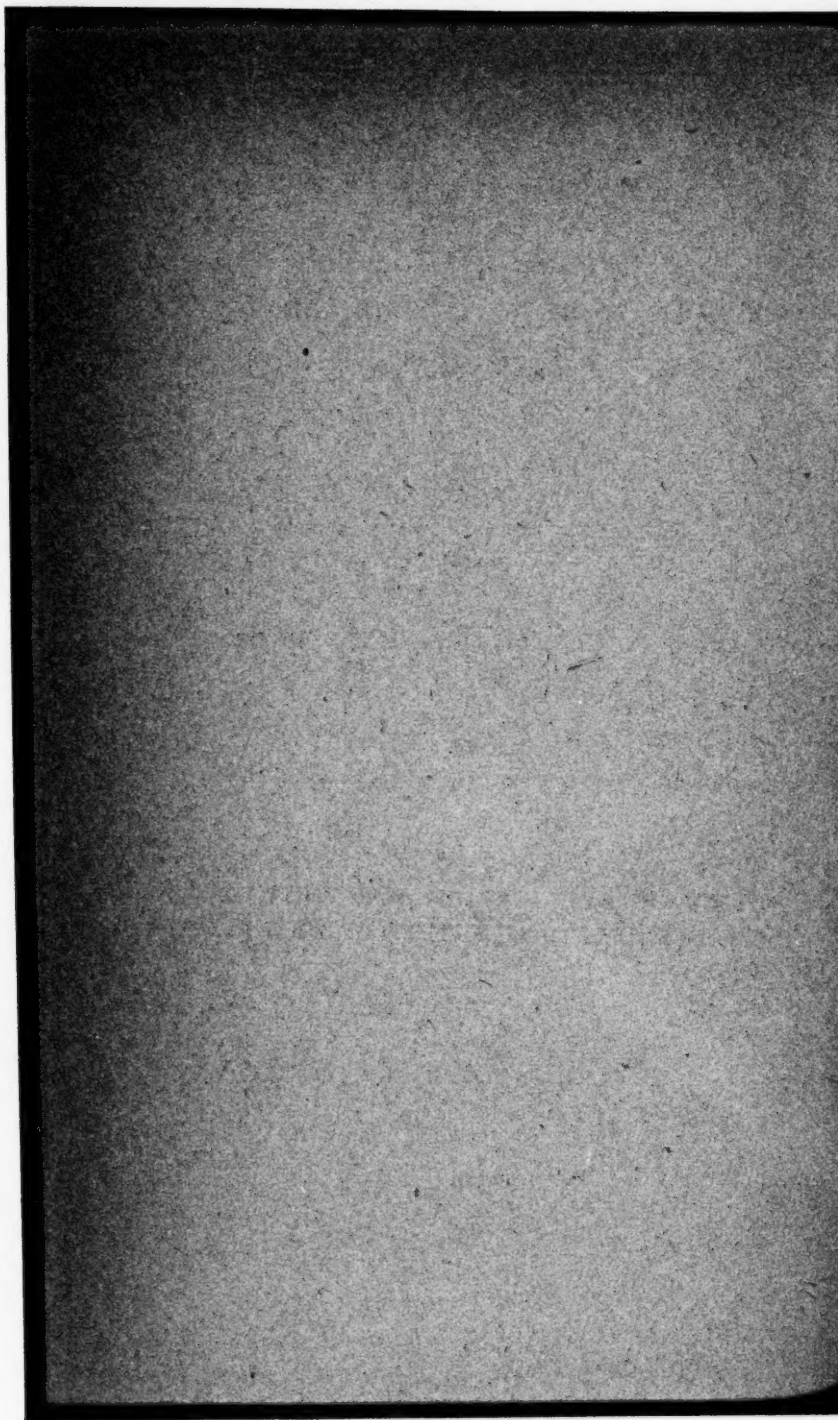
No. 139.

**SHEVLIN-CARPENTER COMPANY AND JOHN F.
IRWIN, PLAINTIFFS IN ERROR,**

STATE OF MINNESOTA, DEFENDANT IN ERROR.

**NOTICE OF APPLICATION FOR WRIT OF HABEAS
CORPUS FOR DIMINUTION OF THE RECORD,
ETC.**

**FRANK B. KELLOGG,
NEWELL H. CLAPP,
R. J. POWELL,
Counsel for Petitioners.**



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 139.

**SHEVLIN-CARPENTER COMPANY AND JOHN F.
IRWIN, PLAINTIFFS IN ERROR,**

vs.

STATE OF MINNESOTA, DEFENDANT IN ERROR.

**Notice of Application for Writ of Certiorari for
Diminution of the Record.**

The above-named defendant in error is hereby notified that the plaintiffs in error in the above-entitled cause will, on Monday, the 21st day of February, 1910, at the opening of the court on that day, or as soon thereafter as counsel may be heard, submit a motion (a copy of which and of the petition for writ of certiorari as above set forth is herewith delivered) to the Supreme Court of the United States at its court-room at the Capitol, in the city of Washington, District of Columbia.

**FRANK B. KELLOGG,
NEWEL H. CLAPP,
R. J. POWELL,**
Counsel for Petitioners.

Service of the foregoing notice and delivery of a copy of said motion and petition for writ of certiorari on the — day of February, 1910, is hereby acknowledged.

Counsel for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 139.

SHEVLIN-CARPENTER COMPANY and JOHN F. IRWIN,
Plaintiffs in Error,

vs.

STATE OF MINNESOTA, *Defendant in Error.*

Motion for Writ of Certiorari.

Come now Shevlin-Carpenter Company and John F. Irwin, the above-named plaintiffs in error, by their undersigned counsel, and move this honorable court to require by writ of certiorari, or other proper process, directed to the Supreme Court of the State of Minnesota, the said court to certify to this court, to be attached and added to the record already on file in this court, the additional documents, records, and proceedings not now appearing in said record which are referred to and described in the annexed petition which is herewith presented, true and correct copies of which said documents, records, and proceedings are attached to said petition.

FRANK B. KELLOGG,

NEWEL H. CLAPP,

R. J. POWELL,

Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 139.

SHEVLIN-CARPENTER COMPANY and JOHN F. IRWIN,
*Plaintiffs in Error,**vs.*STATE OF MINNESOTA, *Defendant in Error.***Petition for Writ of Certiorari for Diminution of the
Record.***To the Honorable the Supreme Court of the United States:*

The petition of Shevlin-Carpenter Company and John F. Irwin, the plaintiffs in error above named, respectfully shows to this honorable court as follows:

The above-entitled cause is now pending in this court on writ of error to the Supreme Court of the State of Minnesota. The facts with reference to the proceedings in said cause, from the time of its commencement to the present time, so far as the same are applicable in connection with this petition, are fully set forth in the affidavit of Newel H. Clapp, one of the attorneys for the plaintiffs in error, which affidavit is hereto attached, referred to, and made a part hereof. Your petitioners aver that it is desired and intended that the constitutional questions referred to in said affidavit and determined and passed upon by the Supreme Court of Minnesota, be presented to this court for consideration and determination; that the record as certified to this court by the clerk of the Supreme Court of the State of Minnesota, and as now appearing in the files of this court, is defective in that it does not contain the following papers and records forming a part of the records and proceedings in said cause in the District and Supreme Courts of the State of Minnesota:

Order of the District Court overruling the demurrer to the complaint in said cause.

Assignments of error filed in said cause by the appellants upon the appeal to the Supreme Court of the State of Minnesota from the said order overruling the demurrer to the complaint.

The opinion of the Supreme Court of the State of Minnesota on said appeal from the order overruling the demurrer to the complaint in said cause.

The assignments of error filed by the appellants in said cause on the second appeal to the Supreme Court of the State of Minnesota.

Your petitioners further aver that the said papers and records above mentioned are essential to a proper and final determination of the said constitutional questions sought to be raised and determined in and by this court, and that true and correct copies of said papers are hereto attached. Under the decisions and practice of this court your petitioners could not have maintained a writ of error from the first decision of the Supreme Court of Minnesota sustaining the order of the District Court of Minnesota overruling the demurrer with leave to answer, and consequently the proceedings and opinion on said first appeal to the Supreme Court of Minnesota are necessarily and properly a part of the record and proceedings in said cause for the purposes of this writ of error from the final judgment rendered in said Supreme Court of Minnesota on the second appeal. *Meagher vs. Minnesota Thresher Mfg. Co.*, 145 U. S., 608; *Clark vs. Kansas City*, 172 U. S., 337.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Court of the State of Minnesota, commanding the said court to certify and send to this court on a day certain to be therein designated, a full and complete transcript of the said papers and records hereinabove specifically referred to in the said case therein, entitled

Shevlin-Carpenter Company and John F. Irwin, appellants,
vs. State of Minnesota, respondent, said papers and records
 not being embodied in the transcript in said cause already
 filed in this court, and that your petitioners may have such
 other or further relief or remedy in the premises as to this
 court may seem appropriate.

FRANK B. KELLOGG,
 NEWEL H. CLAPP,
 R. J. POWELL,
Attorneys for Petitioners.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 18th day of February, 1910, before me personally
 appeared Newel H. Clapp, to me personally known, who,
 being first duly sworn, says that he is one of the attorneys
 for the petitioner above named, and that he has read the
 foregoing petition and knows the contents thereof and that
 the same are true, except as to matters therein stated on in-
 formation and belief, and as to those matters that he believes
 it to be true.

NEWEL H. CLAPP.

Subscribed and sworn to before me this 18th day of Feb-
 ruary, 1910.

[NOTARIAL SEAL.]

H. A. ABERNETHY,
Notary Public, Ramsey County, Minn.

My commission expires March 29, 1913.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 139.

SHEVLIN-CARPENTER COMPANY and JOHN F. IRWIN,
Plaintiffs in Error,
vs.
STATE OF MINNESOTA.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 17th day of February, A. D. 1910, before me personally appeared Newel H. Clapp, who, being by me first duly sworn, on oath did depose and say as follows:

I am one of the attorneys for the plaintiffs in error in the above-entitled cause and have been such attorney since the commencement of said action in the District Court of Ramsey County, Minnesota, on or about the 15th day of May, 1905.

Deponent further says that the first pleading interposed by said plaintiffs in error (defendants below) was a demurrer to the complaint in said action; that after due notice and hearing before the trial court (said cause having in the meantime been removed from Ramsey County to St. Louis County) said demurrer was overruled by the court with leave to the defendants in error to answer the complaint within twenty days after written notice of the order overruling said demurrer, which said order was made on the 1st day of December, 1905; that from said order overruling the demurrer an appeal was duly and seasonably taken to the Supreme Court of the State of Minnesota, and in the meantime all proceedings in said cause were stayed pending said appeal; that on said appeal the appellants (plaintiffs in error here) assigned for error, among others, the following:

"III. The court erred in holding that section 7 of chapter 163 of the laws of 1895 was not void because it contravenes natural justice and invades the natural rights of man, which are protected by the fundamental principles of the social compact.

"IV. The court erred in holding that section 7 in chapter 163 of the laws of 1895 was not unconstitutional and void as being in violation of section 1 of article XIV (being XIV Amendment) of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law."

That the said appeal came on to be heard in the Supreme Court of the State of Minnesota at the April term thereof in the year A. D. 1906, and after argument and due consideration of all the questions involved in said appeal, including the assignments of error above quoted, the said Supreme Court affirmed said order overruling said demurrer and remanded said cause to the district court for further proceedings in conformity with the opinion of said Supreme Court, which said opinion and judgment of the Supreme Court was in writing and constitutes a part of the record in said cause. Thereupon and thereafter the proceedings were had in said cause as set forth in the printed record herein, except that the printed record herein fails to show the assignments of error made by the appellants upon the second appeal, which was from the judgment rendered by the District Court of St. Louis County to the Supreme Court of the State of Minnesota.

And deponent further says that on said second appeal said appellants made the following, among other, assignments of error in said Supreme Court of the State of Minnesota:

"I.

"The court erred in overruling the defendants' objection to any evidence under the complaint, upon the ground that the complaint did not state any facts to constitute a cause of action, because the action is

based upon section 7, chapter 163, Laws of 1895, and that section is in violation and contravention of that portion of the Fourteenth Amendment to the Constitution of the United States, wherein it is enacted and declared 'that no State shall deprive any person of life, liberty, or property without due process of law' (P. B., ff. 55-10).

"II.

"The court erred in overruling the defendants' objection to any evidence under the complaint in this action, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, because this action is based upon section 7, chapter 163, Laws of 1895, and the provisions of that section are in violation and in contravention of natural justice, and because they invade the natural rights of man, which are protected by the fundamental principles of the social compact (P. B., ff. 55-10).

"IX.

"The court erred in its conclusion of law that the plaintiff is entitled to judgment against defendants, and each of them, for the sum of \$26,995.17, for the following reasons:

"1st. Because the law under which this action is brought (section 7, chapter 163, Laws of 1895) is void, being in violation and contravention of that portion of the Fourteenth Amendment to the Constitution of the United States wherein it is enacted and declared 'that no State shall deprive any person of life, liberty, or property without due process of law.'

"2d. Because said section 7, chapter 163, Laws of 1895, is void, being in violation and contravention of natural justice and invading the natural rights of man, which are protected by the fundamental principles of the social compact.

"3d. Because said conclusion is not sustained by any finding of fact or by the evidence in said cause.

"X.

"The court erred in rendering judgment against the defendants, and each of them, for the sum of \$26,995.17, for the same reasons assigned in the preceding assignment of error No. IX."

And that the said assignments of error constituted the "constitutional questions" and all the "constitutional questions" raised and considered by the Supreme Court of the State of Minnesota upon said last-mentioned appeal.

Deponent further says, as will appear, reference being had to pages 10 and 18 of the printed record in this cause, the same constitutional questions have been at all times preserved and urged by the plaintiffs in error in this cause, and no suggestion has ever been made that the said questions were not considered and determined by said Supreme Court of the State of Minnesota, both upon the first appeal from the order overruling the demurrer in said cause and upon the second appeal from the judgment in said cause, until such suggestion occurs in the brief of the defendant in error, which was received by deponent and by all the other attorneys for the plaintiffs in error on the 8th day of February, 1910; that as soon as deponent had read the said brief and discovered the suggestion therein that the questions which are argued at length in both the brief for plaintiffs in error and for defendant in error in this cause were not in fact before this court, and on the 10th day of February, 1910, deponent, with Mr. Olds, representing Mr. Kellogg, called upon the Attorney General and requested him to stipulate that the record in this cause might be amended by adding thereto the order overruling the demurrer to the complaint in said cause, the assignments of error in said cause filed by the appellants upon the first appeal from said order overruling the demurrer to the Supreme Court of the State of Minnesota, the opinion of the Supreme Court of the State of Minnesota on said first appeal, and the assignments of error filed

by the appellants in said cause on the second appeal to the Supreme Court of the State of Minnesota, and that after such conference the Attorney General was then of the opinion that he would be willing to sign such stipulation, and requested deponent and Mr. Olds to prepare and submit a stipulation in writing to the effect above stated, and that such stipulation was prepared and submitted by deponent and Mr. Olds on the 10th day of February, 1910, and after consideration the Attorney General has finally, and on this 17th day of February, 1910, returned said stipulation to deponent, declining to sign the same because he is of the opinion that as a public officer he is not authorized to do so.

Further deponent saith not, except that he makes this affidavit for and on behalf of the plaintiffs in error as one of their attorneys, as aforesaid, and for the purpose of procuring a writ of certiorari from the Supreme Court of the United States addressed to and requiring the clerk of the Supreme Court of the State of Minnesota to send up as a part of the record in said cause a copy of the order overruling the demurrer to the plaintiffs' complaint in said cause, and a copy of the assignments of error upon the appeal from said order overruling said demurrer, a copy of the opinion of the Supreme Court upon said appeal, and a copy of the assignments of error made by the appellants upon the second appeal from the judgment rendered by the District Court of St. Louis County in said cause.

NEWEL H. CLAPP.

Subscribed and sworn to before me this 17th day of February, 1910.

[NOTARIAL SEAL.]

H. A. ABERNETHY,

Notary Public, Ramsey County, Minnesota.

My commission expires March 29, 1913.

DISTRICT COURT, ELEVENTH JUDICIAL DISTRICT.

STATE OF MINNESOTA,
County of St. Louis:

STATE OF MINNESOTA, *Plaintiff,*

vs.

SHEVLIN-CARPENTER COMPANY, *a Corporation,* and JOHN F.
 IRWIN, *Defendants.*

Order Overruling Demurrer.

The demurrer of the defendants to the complaint of the plaintiff came regularly on for hearing, Edward T. Young, Attorney General, and C. S. Jelly, special counsel, appearing for the plaintiff, and Clapp & Macartney, A. Y. Merrill, H. B. Fryberger, and R. J. Powell appearing for said defendants.

And the court having duly considered the arguments of counsel, it is ordered that said demurrer be overruled with leave to said defendants to answer within twenty days after written notice of this order.

By the court:

HOMER B. DIBELL,
Judge of Said Court.

Dated DECEMBER 1, 1905.

Assignments of Error on Appeal from Order Overruling Demurrer.

I.

The court erred in overruling the defendants' demurrer to the complaint herein.

II.

The court erred in holding that chapter 163, and particularly section 7 thereof, of the laws of 1895—under which plaintiff seeks to maintain this action—was not unconstitutional, because it is in contravention of that part of section 7 of article I of the Constitution of the State of Minnesota, which provides that no person shall be deprived of life, liberty or property without due process of law, and in contravention of section 2 of article I of the Constitution of the State of Minnesota, which provides that no member of this State shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers.

III.

The court erred in holding that section 7 of chapter 163 of the Laws of 1895 was not void, because it contravenes natural justice and invades natural rights of man, which are protected by the fundamental principles of the social compact.

IV.

The court erred in holding that section 7 of chapter 163 of the Laws of 1895 was not unconstitutional and void, as being in violation of section 1 of article XIV (being Fourteenth Amendment) of the Constitution of the United States, which provides that no State shall deprive any person of life, liberty or property without due process of law.

V.

The court erred in holding that section 7 of chapter 163 of the Laws of 1895 was not void, as being in violation of

section 7 of article I of the Constitution of the State of Minnesota, which provides that "no person, for the same offense, shall be put twice in jeopardy of punishment."

VI.

The court erred in holding that section 7 of chapter 163 of the Laws of 1895 was not void, as being in violation of that part of section 7 of article I of the Constitution of the State of Minnesota, which provides that—

"no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except in cases of impeachment, in cases cognizable by justices of the peace, or arising in the army, or navy, or in the militia, when in actual service, in time of war, or public danger."

VII.

The court erred in holding that section 7 of chapter 163 of the Laws of 1895 was not void, as being in violation of the provisions of sections 6 and 7 of article I of the Constitution of the State of Minnesota, which secures to a person accused of a crime the right to a trial by jury, to be confronted with the witnesses against him (section 6) and not to be compelled in any criminal case to be a witness against himself.

VIII.

The court erred in holding that the whole of chapter 163 of the Laws of 1895 was not unconstitutional and void, as being in violation of section 27 of article IV of the Constitution of the State of Minnesota, which provides that no law shall embrace more than one subject, which shall be expressed in its title.

IX.

The court erred in overruling the demurrer to the complaint, because, even if the law is constitutional, the remedy to recover the money penalty must be by way of indictment and not complaint in civil action.

Assignments of Error on Appeal from Judgment.

I.

The court erred in overruling the defendants' objection to any evidence under the complaint, upon the ground that the complaint did not state any facts to constitute a cause of action, because the action is based upon section 7, chapter 163, Laws of 1895, and that section is in violation and contravention of that portion of the Fourteenth Amendment to the Constitution of the United States, wherein it is enacted and declared "that no state shall deprive any person of life, liberty, or property without due process of law" (P. B., ff. 55-10).

II.

The court erred in overruling the defendants' objection to any evidence under the complaint in this action, upon the ground that the complaint does not state facts sufficient to constitute a cause of action, because this action is based upon section 7, chapter 163, Laws of 1895, and the provisions of that section are in violation and in contravention of natural justice, and because they invade the natural rights of man, which are protected by the fundamental principles of the social compact (P. B., ff. 55-10).

III.

The court erred in finding as a fact that after the timber in question has been cut, and the amount thereof scaled and

returned by the Surveyor General of the second district to the State auditor, "said auditor erroneously computed the amount due from the defendants for said timber so cut and removed," because no issue was made by the pleadings calling for any such finding, nor was any evidence introduced tending to sustain the same. Finding (P. B., f. 135, page 46); Pleading (P. B., ff. 17-49).

IV.

The court erred in finding the treble value of the timber cut and removed from the lands because there is no evidence or finding of fact that the cutting of the timber from said lands was willful, within the meaning of section 7, chapter 163, Laws of 1895 (P. B., f. 139).

V.

The court erred in so much of its conclusion of law as is contained in the following statement:

"That no legal extension thereof" (of the permit) "could be or was granted beyond the first day of June, 1903, and after said first day of June, 1903, said timber permit was of no effect and absolutely null and void, and was known to be so by the defendants at the time they admit they cut and removed the timber from said lands" (P. B., f. 141) because

(a) The proposition of law that the timber permit could not be extended beyond the first day of June, 1903, is erroneous;

(b) Because the conclusion of law that no extension of the permit was granted beyond the first day of June, 1903, is not sustained by any finding of fact or by the evidence, but on the contrary said conclusion of law is contrary to the undisputed evidence in said cause;

(c) Because in so far as the said finding asserts that the permit was known by the defendants to be absolutely null and void at the time they cut the timber, said conclusion of

law is not sustained by any finding of fact or by the evidence in said cause, but on the contrary the same is contrary to the weight of the evidence in said cause.

VI.

The court erred in its second conclusion of law (P. B., f. 142) in so far as the court concluded as a proposition of law that when the defendants cut the timber they did so without a valid and existing permit for them, or either of them, so to do, and did wilfully, wrongfully, and unlawfully cut and remove the timber, because—

(a) The said finding, as a conclusion of law, is not sustained by the evidence or by any finding of fact; and

(b) If said finding be treated as a finding of fact, it is not sustained by the evidence.

VII.

The court erred in its third conclusion of law (P. B., f. 143) because said conclusion is not sustained by any finding of fact or by the evidence.

VIII.

The court erred in its fourth conclusion of law in so far as it determined that only the sum of \$16,997.19 should be deducted from the amount which the plaintiff is entitled to recover, if entitled to recover at all, and that the sum of \$1,370 was not paid on account of the timber cut, but was paid to obtain the permit (P. B., ff. 146-147), because the said conclusion is not sustained by the evidence or by any finding of fact.

IX.

The court erred in its conclusion of law that the plaintiff is entitled to judgment against defendants, and each of them, for the sum of \$26,995.17, for the following reasons:

1st. Because the law under which this action is brought (section 7, chapter 163, Laws of 1895) is void, being in violation and contravention of that portion of the Fourteenth Amendment to the Constitution of the United States wherein it is enacted and declared "that no State shall deprive any person of life, liberty or property without due process of law."

2d. Because said section 7, chapter 163, Laws of 1895, is void, being in violation and contravention of natural justice and invading the natural rights of man, which are protected by the fundamental principles of the social compact.

3d. Because said conclusion is not sustained by any finding of fact or by the evidence in said cause.

X.

The court erred in rendering judgment against the defendants, and each of them, for the sum of \$26,995.17, for the same reasons assigned in the preceding assignment of error No. IX.

Opinion.

August 3, 1906.

Nos. 14,689-(23).

STATE

v.

SHEVLIN-CARPENTER CO.

Trespass on State Land:

Chapter 163, page 349, Laws 1895, declaring certain acts of trespass upon State lands a crime, imposing a penalty therefor and fixing the measure of damages to be recovered in a civil action, construed, and *held* to impose upon a casual or involuntary trespasser criminal punishment and also double damages for his wrongful acts.

Act Constitutional:

So construed the statute is *held* not obnoxious to constitutional principles, but a valid legislative enactment.

Crimes:

It is within the exclusive power of the legislature to declare what acts shall constitute a crime, to define the same, and to provide such punishment therefor as may be deemed appropriate.

Treble Damages—Constitution:

A statute imposing double or treble damages for a trespass upon lands owned by the State does not violate the constitutional rights of the citizen, even though the same act of trespass may be punishable as a crime.

Recovery of Damages:

The State may recover such damages in a civil action, and, though in the nature of a penalty, the wrongdoer is not thereby twice put in jeopardy of punishment for the same offense.

Twice in Jeopardy:

Section 7, article 1, of the State constitution, providing that no person shall be twice put in jeopardy of punishment for the same offense, applies only to criminal prosecutions.

Title of Statute:

The title of the statute above referred to *held* sufficiently to comply with the constitutional requirement that no law shall embrace more than one subject, which shall be expressed in its title.

Appeal by defendant from an order of the District Court for St. Louis County, Dibell, J., overruling a general demurrer to the complaint. Affirmed.

Clapp & Macartney, A. Y. Merrill, Davis, Kellogg & Severance, H. B. Fryberger, and R. J. Powell for appellant.

Edward T. Young, Attorney General, and C. S. Jelley, Assistant Attorney General, for the State.

Brown, J.:

This action was brought under the provisions of section 7, chapter 163, page 352, Laws 1895, to recover treble damages for an alleged willful trespass upon lands owned by the State by cutting and removing timber therefrom. Defendant interposed a general demurrer to the complaint, and from an order overruling it appealed to this court.

It is alleged in the complaint that at the time stated therein defendant, a corporation, willfully, wrongfully, and unlawfully, well knowing that the State was the owner thereof, entered upon certain school lands of the State and cut and removed therefrom two million four hundred forty-four thousand twenty feet of timber of the value of \$17,108.14; that by reason of the fact that the act of defendant was willful it became, and is liable, to the State for treble the value of the timber so cut and removed, and judgment was demanded accordingly. The statute under which the action was brought provides as follows:

"SECTION 7. If any person, firm or corporation, without a valid and existing permit therefor, cuts or employs, or induces any other person, firm or corporation to cut, or assist in cutting any timber of whatsoever description, on State lands, or removes or carries away or employs, or induces or assists any other person, firm or corporation to remove or carry away any such timber, or other property, he shall be liable to the State in treble damages, if such trespass is adjudged to have been willful; but double damages only in case the trespass is adjudged to have been casual and involuntary, and shall have no right whatsoever to any remuneration or allowance for labor or expenses incurred in removing such other property,

cutting such timber, preparing the same for market, or transporting the same to or towards market. Whoever cuts or removes, or employs or induces any other person, firm or corporation to cut or remove any timber or other property from State lands, contrary to the provisions of this act, or without conforming in each and every respect thereto, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding one thousand (1,000) dollars, or by imprisonment in the State prison not exceeding two (2) years, or by both in case the trespass is adjudged to have been willful."

The questions presented by defendant in support of the demurrer, which we deem entitled to special consideration, resolve themselves into four propositions, or contentions, namely:

"1. That the statute, in imposing a double liability for a casual or involuntary trespass, is obnoxious to those provisions of the State and Federal Constitutions which provide that no person shall be deprived of life, liberty, or property without due process of law. That in declaring the casual or involuntary trespass a crime, it violates sections 2 and 7 of article 1 of the State constitution, as well as contravenes natural justice, and invades those natural rights, which, if not directly, are impliedly, secured by the Constitution, or are protected by the fundamental principles of the social compact and exist independent of constitutional guaranty.

"2. That in so far as it provides for the recovery of double or treble damages in a civil action, it contravenes section 7, article 1, of the State constitution, which provides, among other things, that no person shall be put twice in jeopardy of punishment for the same offense.

"3. That the damages given by the statute being in the nature of a penalty, can be recovered only by way of indictment and criminal prosecution.

"4. That the subject of the statute is insufficiently stated in its title."

1. Counsel for the State suggest that the first contention of defendant above mentioned is not involved in the case, for the reason that the action was not brought to recover double damages, but under the treble-damage feature of the statute, and based upon allegations that the trespass and acts of defendant complained of were willful and unlawful.

But this view of the case is not tenable. The statute was intended to establish a definite measure of damages in all cases of trespass upon State lands, and to that end treble damages are provided for a willful, and double damages for a casual or involuntary, trespass, thus wholly abrogating the rules of the common law in such cases. It is true that the action is founded upon an alleged willful trespass; but if the State should fail to prove the allegation of willfulness, and the trespass should, on the trial, turn out to have been casual or involuntary, recovery could undoubtedly be had for the amount fixed by the statute for a trespass of that nature, viz., double damages. If, as in all probability will be the case, the main issue in the litigation should be the alleged willfulness on the part of the defendant, the latter would be entitled to an instruction to the jury that, in the event the State failed to prove the affirmative of that issue by a fair preponderance of the evidence, treble damages could not be given; and coupled therewith the court would be required to say that the failure of proof on that issue would not deprive the State of the right to a verdict for damages under the next and only other rule applicable to the case. So that defendant is in position to insist that the statute is invalid, so far as it imposes a penalty in the way of double damages, for a casual or involuntary act of trespass. 5 Enc. Pl. & Pr., 729; *Starkweather v. Quigley*, 7 Hun., 26, 29; *Sprague v. Irwin*, 27 How. Pr., 51; *Dubois v. Beaver*, 25 N. Y., 123; 82 Am. Dec., 326; *Clark v. Field*, 42 Mich., 342; 4 N. W., 19; *Rhemke v. Clinton*, 2 Utah, 230.

The first subject for consideration is the construction of the statute. If susceptible of a construction to the effect that

there was no intention on the part of the legislature to declare the casual or involuntary trespass a crime, one feature of defendant's position would be eliminated, and it is important to ascertain the intention of the statute in this respect. The first paragraph of the section treats of the civil remedy. It provides that if any person, firm, or corporation, without a valid and existing permit issued in accordance with other provisions of the statute, cuts, or induces any other person to cut or assist in cutting, any timber of any description upon any State land, or removes or carries the same away, or employs or induces another to do so, he shall be liable to the State in treble damages, if the trespass is adjudged to have been willful, but double damages where it is adjudged to have been casual or involuntary. The second paragraph deals with the subject from the penal standpoint, and declares that any person who shall cut or carry away such timber, or assist another in such an act, contrary to the provisions of the preceding paragraph, shall be guilty of a felony and punished by a fine not exceeding \$1,000, or by imprisonment in the State prison for a period of not more than one year, or by both fine and imprisonment where the trespass is adjudged to have been willful. The statute contains remedial and penal features, and as respects the former is entitled to a liberal construction, but as to the latter must be strictly construed (Sutherland, St. Const., §§ 337, 532).

Remedial statutes are generally treated with considerable liberality and are construed in the light of what was demanded or required of the lawmakers, the evils intended to be guarded against, and the particular wrongs to be remedied. Words are often omitted, or supplied by implication, and sentences transformed, to render the statute a consistent whole and effectuate the legislative will; and this, too, in construing penal, as well as remedial, statutes, though many of the courts hold that the strict letter of a penal statute must control as against the State. But, after all has been said in generalizing upon the rules of construction, they all con-

verge to the same point and bring up at the ultimate inquiry, the intention of the legislature.

By taking into consideration well-known facts leading up to the adoption of the statute in question, no difficulty is experienced in discovering the legislative will in this instance. The State is possessed of large tracts of timber lands of incalculable value, upon which designing persons have persistently trespassed, cutting and removing therefrom valuable pine timber. The State, through its officials, has been confronted with difficulties in detecting the guilty parties and bringing them to justice, and has been defrauded and robbed of large sums of money by their acts. It finally was thought necessary to enact a very stringent law to prevent future trespass, and the drastic statute under consideration was the result. The statute exacts from the casual or involuntary trespasser double damages, and also declares his act a felony. The language of paragraph 2 will admit of no other view. It provides that any person who shall cut or remove timber from any lands of the State, contrary to the provisions of the statute, shall be guilty of a felony, and punished as there prescribed. No exception is found exempting the casual or involuntary trespasser from the penalty. That it was intended he should be criminally punished, in addition to the payment of double damages, is made certain by that clause of the section which provides for both fine and imprisonment where the trespass is adjudged willful.

While courts, in construing statutes of this kind, where the language employed is broad and comprehensive enough to cover both willful and involuntary acts, restrict the recovery of double or treble damages to cases of willful trespass (*McDonald v. Montana*, 14 Mont., 88; 35 Pac., 668; 43. Am. St., 616; *Kremer v. Goodlander*, 98 Pa. St., 353; *State v. Baker*, 47 Miss., 88; *Cohn v. Neeves*, 40 Wis., 393), the statute under consideration is too explicit to admit of that rule, and we construe it, in harmony with its plain,

unambiguous language, to impose upon the casual trespasser criminal punishment as well as double damages.

As so construed, is it obnoxious to constitutional principles? We think not. The gist of the objection to the statute is that it punishes a person for an act which might, under some circumstances, be the result of a simple mistake—an act innocent in itself and committed with no evil purpose or intent. This, however, seemingly meritorious at first thought, is without force. One of the exclusive provinces of the legislative department of government is to declare what acts or omissions shall constitute a crime, to define the same, and provide such punishment therefor as may be deemed appropriate, and, unless the constitutional rights of the citizen be invaded, its determination in all such matters is conclusive upon the courts. The legislature may declare that a willful trespass upon the lands of another shall constitute a criminal offense and fix the limits of punishment therefor, either by fine or imprisonment, or by compensating the injured party in damages to be recovered in a civil action, or by both, as its judgment may dictate.

Legislative provision for double or treble damages in such cases is sustained by many of the courts in this country. 12 Am. & Eng. Enc. (2d ed.), 8 *et seq.*; *Brown v. Evans*, 8 Saw., 488; 17 Fed., 912; *Smith v. Bagwell*, 19 Fla., 117; 45 Am., 12; *Hendrickson v. Kingsbury*, 21 Iowa, 379, 380; *Brown v. Swineford*, 44 Wis., 282; 28 Am., 582; *Mayer v. Frobe*, 40 W. Va., 246; 22 S. E., 58; *Missouri Pac. Ry Co. v. Humes*, 115 U. S., 512; 6 Sup. Ct., 110; 29 L. Ed., 463; *Boetcher v. Staples*, 27 Minn., 308; 7 N. W., 263; 38 Am., 295; 13 Cyc., 118, and cases cited. Although there may be a limit beyond which the legislature may not go, either in declaring what acts shall constitute a crime or in imposing an arbitrary rule of damages in excess of actual compensation, whether that limitation be found in those inherent rights reserved to the people by section 16 of article 1 of our State constitution, or in those inalienable rights men-

tioned in the Declaration of Independence, or in those ingrafted upon the Constitution by implication through the process of construction by the courts (62 Cent. L. J., 144; 6 Columbia L. Rev., 69), we are clear that the authority of the law-making body was not exceeded in this instance in extending the rule of the cases above cited to the casual and involuntary trespass. An evil intent is ordinarily an essential element in all criminal prosecution, but it may be dispensed with in particular cases by the legislature.

The act under consideration, in so far as it imposes a criminal punishment or double damages for the casual or involuntary trespass, dispenses with the necessity of proving a malicious or other wrongful purpose, and the pivotal question is whether the legislature could, within constitutional restrictions, so enact. The law on this subject is correctly summed up in Clark & Marshall's Law of Crimes, 103, as follows: "Public policy may require the legislature, in prohibiting and punishing particular acts under certain circumstances, to provide expressly or impliedly, that any person who shall do the act shall do it at his peril, and that he shall not be allowed to escape punishment by showing that he acted in good faith, without negligence, and in ignorance of the existence of the circumstances rendering the act unlawful. If the language and subject-matter of the statute show clearly that this was the intention of the legislature, the courts must give it effect, however harshly the statute may seem to operate in the particular instance." The principle of law thus laid down is supported by an almost unanimous line of authorities, both in this country and in England. *Com. v. Wentworth*, 118 Mass., 441; *Regina v. Woodrow*, 15 Mees. & W., 404; *Halsted v. State*, 41 N. J. L., 552; 32 Am., 247; *Com. v. Connelly*, 163 Mass., 539; 40 N. E., 862; *Com. v. Murphy*, 165 Mass., 66; 42 N. E., 504; 30 L. R. A., 734; 52 Am. St., 496; *State v. Kelly*, 54 Ohio St., 166; 43 N. E., 163; *State v. Smith*, 10 R. I., 258; *State v. Huff*, 89 Me., 521; 36 Atl., 1000; *State v. Zichfield*, 23

Nev., 304; 46 Pac., 802; 34 L. R. A., 784; 62 Am. St., 800; *People v. Waldvogel*, 49 Mich., 337; 13 N. W., 620; *People v. Roby*, 52 Mich., 577; 18 N. W., 365; 50 Am., 270; *State v. Presnell*, 34 N. C., 103.

We have already referred to the conditions existing in the State which prompted the legislature to enact this law—the fact that the lands of the State were being stripped of their value by willful and reckless trespassers, and the great difficulty experienced by its officials in bringing guilty parties to justice under statutes which imposed a penalty only where the trespass was willful. In these conditions the legislature deemed the property rights of the State would be best protected by dispensing in the future with the question of evil intent, casting upon the individual the burden of determining at his peril the boundary lines of land from which he takes and removes standing pine. Within the principle of law to which we have just alluded, such legislation is sanctioned by sound public policy and is valid.

A similar statute, but far less explicit than the one under consideration, was sustained by the Supreme Court of South Dakota in *State v. Dorman*, 9 S. D., 528; 70 N. W., 848. A recent decision of the Supreme Court of Michigan is also directly in point, *People v. Christian* (Mich.), 107 N. W., 919. The statute under consideration in that case provided that every person, not lawfully authorized, who should himself enter upon, or induce or direct any other person to enter upon, lands owned by the State and cut and remove timber therefrom should be guilty of a felony and punished by imprisonment in the State's prison for a term not exceeding two years, or by fine not exceeding \$500, or by both fine and imprisonment. That statute was amendatory of a prior statute, which provided for punishment only where the trespass was willful, and the court held the statute valid, saying that it was as competent for the legislature to make an act of trespass criminal as it was to make the opening of a saloon a criminal act. It appears from the opinion in that case that trespasses upon public lands, as in this State, had

become notorious; that the State had been defrauded of thousands of dollars' worth of valuable timber, and the court remarked that it had no difficulty in reaching the conclusion that the legislature not only intended to eliminate the question of evil intent, but possessed the power to so enact.

The act under consideration is analogous to statutes prohibiting the sale of liquors to minors, in construing which the courts uniformly hold that the honest belief of the person making the sale that the minor was of age is no defense, and to statutes prohibiting the sale of adulterated foods, where it is held that persons selling articles of food must know at their peril whether they are adulterated. It is no defense in such cases that the retail dealer procured the articles from a manufacturer and disposed of them under the belief that they were pure and unadulterated. Statutes imposing double damages for animals killed or injured by railroad trains in consequence of a failure on the part of the company to fence its right of way are also analogous (*Missouri Pac. Ry. Co. v. Humes*, 115 U. S., 513; 6 Sup. Ct., 110; 29 L. Ed., 463; 12 Am. & Eng. Enc. (2d ed.), 1073); or for double costs in such cases (*Schimmele v. Chicago, M. & St. P. Ry. Co.*, 34 Minn., 216; 25 N. W., 347); and, too, statutes providing double damages for injuries done by vicious dogs, killing or injuring sheep or cattle, without regard to whether the owner of the dog knew of his vicious propensities. Statutes dispensing with the necessity of proving a scienter in such cases are sustained. 2 Am. Eng. Enc. (2d ed.), 372, 374; *Trompen v. Verhag*, 54 Mich., 304; 20 N. W., 53; *Newton v. Gordon*, 72 Mich., 642; 40 N. W., 921; *Kerr v. O'Connor*, 63 Pa. St., 341; *Chickering v. Lord*, 67 N. H., 555; 32 Atl., 773. Other similar legislation, founded in an exercise of the police power or justified by public policy, might be referred to, but it is unnecessary.

The authorities cited justify the conclusion that the statute under consideration, in imposing a criminal punishment for the casual and involuntary trespass, is within the limits

of constitutional restrictions and valid; and, if valid in that respect, it follows, *a fortiori*, that it was within the power of the legislature to award double damages for the same wrong. In so dispensing with the wrongful intent the legislature violated no constitutional right of the citizen, and the statute must be enforced.

2. It is also contended that the statute, as respects double and treble damages, violates section 7 of article 1 of the State constitution, which provides that no person shall be twice put in jeopardy of punishment for the same offense.

This proposition is founded upon the theory that double or treble damages are in the nature of a penalty, or as punishment for the wrong for which they are imposed, and that to sustain the statute would result in twice punishing the wrongdoer; at least that he would be in jeopardy of a second punishment if such damages were recovered in this action. Defendant is probably a little premature in raising the point. It might come with some force if presented in a criminal prosecution after recovery in a civil action. But we do not dispose of the question upon this ground. Upon its merits the courts are not in entire harmony, though we regard it as settled in this State by the decision in *Boetcher v. Staples*, 27 Minn., 308; 7 N. W., 263; 38 Am., 295. The court in that case said: "The rule, according to the great mass of authorities, applies as well where the wrongful acts of defendant bring him within the law for punishing crimes as where they are less aggravated in their character." The authorities on the subject are collected and discussed in 2 Sutherland, Dam., §§ 390-396. That the awarding of exemplary damages in an action for a tort, although punishable as a criminal offense, is not a violation of the constitutional provision that no person shall be twice put in jeopardy for the same offense is affirmed by the great majority of the courts. 13 Cyc., 118; 12 Am. & Eng. Enc., 2d ed., 8-10, and cases cited. Nor does it deprive the citizen of his property without due process of law. *Missouri Pac. Ry. Co. v.*

Humes, *supra*. The provisions of the Constitution referred to apply to criminal prosecutions only. 12 Am. Eng. Enc., 2d ed., 8, and cases cited.

Counsel for appellant recognize that the rule on this subject is settled in this State as between individuals, but they earnestly contend that the rule laid down in *Boetcher v. Staples, supra*, should not be applied in an action brought by the State; that to sustain the right of the State to exemplary damages, and its further right to prosecute and punish defendant under the criminal provisions of the statute, would violate both the letter and the spirit of the Constitution. It is insisted that exemplary damages are awarded in a measure to gratify the feelings of the aggrieved party; that the State has no such feelings, no vengeance or avarice; that it punishes the guilty in the interests of society, and not to add to its revenues. This is plausible, but not tenable. Whatever, in legal contemplation, exemplary damages may be, whether properly termed aggravated relief or a penalty pure and simple, they are not imposed in the sense of or as a substitute for criminal punishment, but rather as enlarged damages for a civil wrong. No sound reason occurs to us why the State in preservation of the property intrusted to it for the use and benefit of the people should not be granted all remedies that are afforded and extended individuals in the protection of their property and property rights. Indeed, potent reasons might be suggested for granting the State special privileges in this respect. Its property, particularly school lands, is located in remote parts of the State and it is without adequate facilities for guarding and protecting the same from trespasses. Its lands have been denuded of valuable timber year after year, and the school fund of the State has thus been greatly depleted. If the legislative department is without power to extend to it the rights possessed and granted the individual, the equal protection of the law in its property rights would be denied it. Statutes tempered in modera-

tion as to penalty have proven in the past ineffectual, and unless the stringent features of the present statute are sustained in all respects trespasses will continue in the future with impunity. No injustice can possibly result from requiring persons to ascertain the boundaries of lands owned by them, and we do no violence to no inherent right of the citizen in sustaining a statute the purpose of which was to impose that duty upon it.

3. Counsel for defendant also contend that the damages awarded by the statute, being in the nature of a penalty, can be recovered only by way of indictment and criminal prosecution; that the State cannot maintain a civil action to recover the same. We do not concur in this contention. We deem it unnecessary to extend the opinion by its discussion. Respecting the right of the State to maintain a civil action to recover exemplary damages, we entertain no serious doubt; in matters involving its proprietary or business functions the State occupies the same position in the courts as private suitors. 26 Am. Eng. Enc., 2d ed., 485.

4. The further contention that the statute is invalid in that the subject thereof is not sufficiently expressed in its title is not well taken. The title of the act is,

"An act regulating State lands and the product of the same, and to repeal certain acts and parts of acts."

Though the title is not so expressive as it might have been made, the constitutional requirement is substantially complied with. The statute made the subject-matter of the title is a practical revision of prior statutes and contains numerous conditions and provisions regulating and controlling the sale, leasing, or other disposition of State lands. The title does not come within the objection that it was employed as a cloak for inappropriate legislation, but answers the purpose intended by the framers of the constitution, which was not to require the subject-matter of proposed legislation to be expressed fully and explicitly in the title,

but to prevent such enactments as chapter 24, page 73, Laws 1855, where, under the title, "An act to incorporate the Root River Valley & Southern Minnesota Railroad Company," the legislature incorporated the railroad company, located the county seat of Fillmore county, declared the county of Wright duly organized, and provided for the appointment of certain officers therein.

This covers all questions, discussed in the briefs, which we deem entitled to special reference, and for the reason stated the order of the trial court overruling the demurrer to the complaint is affirmed.

Order affirmed.

FILED.
FEB 24 1910
JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 139.

SHEVLIN-CARPENTER COMPANY and JOHN F. IRWIN,
Plaintiffs in Error,

VS.

STATE OF MINNESOTA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON MOTION FOR
WRIT OF CERTIORARI.

GEORGE T. SIMPSON,
Attorney General,
CHARLES S. JELLEY,
Assistant Attorney General,
LYNDON A. SMITH,
Assistant Attorney General,
Attorneys for the State of Minnesota.

THE HISTORY OF THE
CITY OF BOSTON

FROM THE FIRST SETTLEMENT
TO THE PRESENT TIME

BY
JOSEPH NEALE

IN TWO VOLUMES

LONDON: PRINTED BY J. JOHNSON, ST. PAUL'S CHURCH-YARD, 1796.

Supreme Court of the United States.

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BRIEF OF DEFENDANT IN ERROR ON MOTION FOR
WRIT OF CERTIORARI.

The plaintiff in error (defendant below) having moved this court for a writ of certiorari to the Supreme Court of Minnesota, directing the clerk of that court to certify to this court as a part of the record in the above entitled cause, certain assignments of error and certain orders and opinions of the trial, and of the Supreme Court, of the State, which assignments of error, orders and opinions are not now, here in the record, but which plaintiffs in error now believe and state in their petition are essential to the proper presentation of

their case in this court, the State of Minnesota desires that the Court should be informed of the following facts, and the law applicable thereto as contended for by the State:

This action was begun on May 15, 1905. The complaint charges, inter alia, that theretofore the defendants "did wilfully, wrongfully and unlawfully cut and remove 2,444,020 feet of timber" from what is commonly known as the "school lands" of the State. The complaint fixes the value of the pine timber which it claims was thus unlawfully taken by the defendants at \$17,108.14, but demands judgment in three times that amount, or \$51,324.42, by reason of the provisions of Chapter 163, Laws of Minnesota 1895, which provides, in effect, that one who unlawfully and wilfully trespasses upon State timber land, and who unlawfully and wilfully cuts and removes timber therefrom, shall be liable in treble the value of the timber cut and removed. Printed Transcript, folio 1-3, p. 9. Brief of the State, Appendix A, Sec. 7, pp. V-VI.

The defendants demurred to the complaint. The trial court overruled the demurrer. On appeal the Supreme Court of the State of Minnesota sustained the trial court by an opinion filed August 3, 1906. *Judgment entered August 3, 1906*

State v. Shevlin-Carpenter Co., 99 Minn. 158.
Brief of State, Appendix B.

The defendants then answered over; and on the trial, on the merits, the State had judgment for \$27,553.07, the defendants being given credit for what they had theretofore voluntarily paid into the

state treasury. The defendants again appealed to the State Supreme Court. Again the latter court by an opinion filed November 1, 1907, sustained the lower court, but this time only in part, directing judgment in favor of the State in the sum of \$14,664.12, and remanding the case to the lower court with directions to reduce the judgment to that amount. P. T., f. 69, p. 48.

State v. Shevlin-Carpenter Co., 102 Minn. 470.

The defendants thereupon brought the matter to this court by writ of error.

The transcript of the record was filed in the office of the clerk of this court on April 25, 1908. The plaintiffs in error did not include in such transcript the assignments of error urged in either appeal before the Supreme Court of Minnesota. Nor did they include the opinion of the Supreme Court of the state rendered upon the first appeal, where the Supreme Court of Minnesota says "the constitutional questions were raised."

State v. Shevlin-Carpenter Co., 102 Minn. 470.
Brief of State, Appendix C, p. LV.

The firm of Clapp & McCartney, of which N. H. Clapp, Esq., is a member, the attorney for plaintiffs in error who signs the affidavit on which the motion at bar is based, signed the original demurrer, and has represented the plaintiff in error throughout the entire litigation. Said N. H. Clapp, Esq., is now one of its attorneys.

The October, 1908, term of this court passed by, in its entirety, and no attempt was made to correct the record.

The printed transcript was forwarded by the clerk of this court, and received by the attorneys for the plaintiff in error on the ...^{24th} day of *July*., 1909. Subsequent thereto plaintiff in error served its printed brief on the attorneys for the State.

There was still no effort made to correct the record.

The State thereupon prepared and printed its brief, filed the same with the clerk of this court on the 24th day of January, 1910, and therein called attention to the failure of the plaintiff in error to bring up such assignments of error, and the further failure of plaintiff in error to bring up, in the record, the opinion of the Supreme Court of Minnesota, rendered on the first appeal, where the constitutional questions were raised, and suggested that therefore the writ of error should be dismissed. Brief of State, p. 9-10-11-12-13. The State on the 8th day of February, 1910, served such brief upon the attorneys for the plaintiff in error.

The State, however, as a part of its brief, and in order that this Court might, at least, have the same before it in convenient form, and notwithstanding the failure of the plaintiffs in error to present the same in the record, printed the opinion of the Supreme Court of the State on the *first* appeal, the statute involved, and also the opinion of the Supreme Court of the State upon the second appeal, the latter being the opinion, upon the rendition of which, plaintiff in error had this writ of error. Brief of State, Appendix A, B and C.

On February 10, 1910, application was made by the attorneys of plaintiff in error to the Attorney General to correct the record by stipulation. The proposed written stipulation was received by the State on February 11, 1910; the State held it six days, and thereupon declined to sign it for the reasons stated. Hence this application for a writ of certiorari.

This case is No. 139 on the docket of the present term of this court.

Such being the situation, the rule of this court applicable thereto is as follows:

"Rule 14. No certiorari for diminution of the record will be hereafter awarded in any case unless a motion therefor shall be made in writing and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for certiorari must be made at the first term of the entry of the case; otherwise the same will not be granted unless upon special cause shown to the Court, accounting satisfactorily for the delay."

Under similar circumstances the above rule has been heretofore enforced by this Court.

Chappell v. United States, 160 U. S. 499-506.

The State assumes that under its terms this rule will be enforced by the Court unless "special cause is shown accounting satisfactorily for the delay." Apparently the only cause shown for the delay, in not moving for a writ of certiorari, is, as disclosed by the application at bar, and by the affidavit attached.

(a) That while the assignments of error and the opinions now sought to be included in the record are "essential" to the case of the plaintiff in error herein, the failure to return the same, and the further fact that they were not in the record, nor in the printed transcript, were not known to the many eminent counsel for the plaintiff in error until they had received the brief of the State; and

(b) That the State by its attorneys, public officers, failed to stipulate at the request of the plaintiff in error on February 10, 1910, something into the record, which was not there and which to the plaintiff in error was "essential."

No one denies, now, that the record should contain the assignments of error in the court below, and that they are *essential* to the proper presentation of the cause of plaintiff in error.

Waters-Pierce Oil Co. v. Texas No. 2, 212 U. S. 112-115.

Harding v. Illinois, 196 U. S. 78.

State's Brief, pp. 9-10-11-12.

But simply because such assignments of error are "essential" to the proper presentation of the claim of plaintiff in error, in this controversy, it does not follow, nor does that fact appeal to the defendant in error, as a cogent reason, why, at this late day, when this cause is just about to be submitted to this Court for final determination, the plaintiffs in error, over the objection of defendant in error, and in the light of the preceding statement of facts, should be granted the prayed for writ of certiorari.

The record was filed by plaintiffs in error in this court practically two years ago; and some months ago the attorneys of the plaintiff in error had the printed copy of the transcript. Yet as an excuse for the delay in applying for this writ of certiorari, the plaintiff in error now alleges that its attorneys did not know that an *essential* part of such record was wanting until they had been advised of the situation by the State in its brief.

The State of Minnesota respectfully suggests that neither the failure of counsel in behalf of whose client the writ of error was obtained, to know what "essential" matters the record contained, or failed to contain; nor the hesitation for a few days by the attorneys of the State to sign a stipulation, which they ~~believed~~ ^{considered} they had no right to sign, without a betrayal of the interests of their client, should be seriously urged upon, or considered by, this court as "a special cause shown to the Court accounting satisfactorily for the delay" in not making application sooner for this writ of certiorari. The application should be denied.

Chappell v. United States, *supra*.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1909.

NO. 139.

SHEVLIN-CARPENTER COMPANY and JOHN F.
IRWIN,

Plaintiffs in Error,

vs.

THE STATE OF MINNESOTA.

BRIEF OF PLAINTIFFS IN ERROR.

N. H. CLAPP,
R. J. POWELL,
FRANK B. KELLOGG,
GEORGE W. MORGAN,
For Plaintiffs in Error.

Office Supreme Court, U. S.
FILED.

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JAMES H. McKENNA

Supreme Court of the United States

OCTOBER TERM, 1909.

NO. 139.

SHEVLIN-CARPENTER COMPANY and JOHN F.
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Plaintiffs in Error,

vs.

THE STATE OF MINNESOTA.

STATEMENT OF THE CASE.

This action was brought by the State of Minnesota against the Shevlin-Carpenter Company, a corporation, and John F. Irwin, under the provisions of Section 7, Chapter 163 of the Laws of Minnesota for 1895, to recover treble damages for an alleged wilful trespass upon lands owned by the state by cutting and removing timber therefrom. The statute under which the action was brought is as follows:

"Sec. 7. If any person, firm or corporation, without a valid and existing permit therefor, cuts or employs, or induces any other person, firm or corporation to cut, or assist in cutting any timber of whatso-

ever description, on state lands, or removes or carries away or employs, or induces, or assists any other person, firm or corporation to remove or carry away any such timber, or other property, he shall be liable to the state in treble damages, if such trespass is adjudged to have been wilful; but double damages only in case the trespass is adjudged to have been casual and involuntary, and shall have no right whatsoever to any remuneration or allowance for labor or expenses incurred in removing such other property, cutting such timber, preparing the same for market, or transporting the same to or towards market.

Whoever cuts or removes, or employs or induces any other person, firm or corporation to cut or remove any timber or other property from state lands, contrary to the provisions of this act, or without conforming in each and every respect thereto, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding one thousand (1,000) dollars, or by imprisonment in the state prison not exceeding two (2) years, or by both, in case the trespass is adjudged to have been wilful.

Whenever any timber so cut is intermingled with any other timber, or whenever other property taken from state lands is intermingled with other property, the state may seize and sell the whole quantity so intermingled, pursuant to the provisions of section forty (40) of this act, and such other timber or property shall be presumed to have been also cut from state lands.

Provided the intermingling of timber above referred to shall only apply to cases having been adjudged as wilful trespass."

The state's complaint alleged that the defendants acting and co-operating together and well knowing that the plaintiff was the owner of the certain land and the timber thereon, without a valid or existing permit, but wrongfully and in violation of law entered upon and caused their agents and employes to enter upon the land, and that they and

their agents and employes did wilfully, wrongfully and unlawfully cut and remove 2,444,020 feet of timber from the lands, of the reasonable worth and value of \$17,108.14. The complaint further alleged that by reason of such wilful, wrongful and unlawful entering and trespass, the defendants and each of them were liable to the plaintiff for treble the value of the timber so cut and removed, to-wit, the sum of \$51,324.42, and demanded judgment for that amount. The defendants interposed a general demurrer to the complaint, and from an order overruling this demurrer in the District Court, appealed to the Supreme Court of the State, where, in *State v. Shevlin-Carpenter Company*, 99 Minn. 158, the order of the District Court overruling the demurrer to the complaint was affirmed. The constitutionality of the statute was attacked upon the appeal upon several grounds, namely:

1. That the statute in imposing a double liability for casual or involuntary trespass was obnoxious to those provisions of the state and federal constitutions which provide that no person shall be deprived of life, liberty or property without due process of law.
2. That in declaring the casual or involuntary trespass a crime the statute offended in the same way.
3. That in so far as the statute provided for the recovery of double or treble damages in a civil action, it contravened the section of the state constitution which provides that no person shall be twice placed in jeopardy of punishment for the same offense.
4. That the damages given by the statute, being in the nature of a penalty, could be recovered only by way of indictment and criminal prosecution. All these points were resolved in favor of the state.

After the decision in the Supreme Court affirming the order overruling the demurrer to the original complaint, the case went to trial in due course in the District Court, and the defendants interposed an answer, admitting the cutting of the timber, denying the value to be \$17,108.14, and denying that the defendants, or either of them, were liable to the plaintiff for treble the value of the timber so cut and removed, or any part thereof. The defendants then further alleged: "That the provisions of Section 7, Chapter 163 of the General Laws of 1895, under which the plaintiff seeks to recover a penalty or enhanced damages from these defendants by reason of the alleged acts of trespass in said complaint set forth, is in violation and contravention of that portion of the 14th Amendment to the Constitution of the United States, wherein it is enacted and declared 'that no state shall deprive any person of life, liberty or property without due process of law,' and that the said provisions of said Section 7 are also in violation and in contravention of natural justice, and because they invade the natural rights of man, which are protected by the fundamental principles of the social compact.

"And in that behalf the defendants further allege that the defendant John F. Irwin is, and during all the times in the answer or in said complaint stated, was a citizen of the United States." (Printed Record, page 10.)

Further answering, the defendants set forth a sale to the defendant Irwin of the pine timber upon the lands described in the complaint at and for the agreed price of \$7.00 per thousand feet, board measure, and that thereafter and in due course of business a permit to cut and remove the timber was executed to the defendant Irwin by the Auditor and Land Commissioner of the plaintiff State, and a copy

of which permit is attached to the answer and is set forth in the printed record at pages 13 to 16 inclusive.

This permit bears date November 14, 1900, and by its terms gave the defendants the right to cut and remove all of the timber from the land described therein up to and including June 1, 1902.

It is further alleged in the answer that before the time limited by the contract, or permit, within which to cut and remove the timber had expired, the Board of Timber Commissioners of the State did extend the contract until the 1st of June, 1903, and that thereafter a further extension was made by the same Board of Timber Commissioners authorizing and empowering the defendants to cut and remove the timber in accordance with the terms of the permit during the logging season of the year 1903-4, the defendants to pay interest upon the contract price at the rate of 8 per cent per annum for the additional year so granted.

It is then alleged that pursuant to the contract and permit and the extensions thereof above mentioned, the defendants did enter upon the lands during the logging season of the year 1903-4, and did cut and remove therefrom the amount of timber hereinbefore specified, and in all things complied with and performed the terms and conditions imposed upon the defendants by the permit and the extension thereof; the logs were duly scaled by the proper officer and the amount returned to the State Treasurer, and thereupon the State Treasurer computed the amount due, adding interest at the rate of 8 per cent per annum and a certain amount for the expense of scaling, and having deducted therefrom the amount which was paid by the defendants at the time of the execution of the permit as therein recited, viz., \$1,370.00 (Printed Record, pp. 13-14) the State Treasurer made his draft upon the defendant

Irwin for the balance found to be due, to-wit, \$17,144.39, and thereupon the draft was paid by the defendants "in full settlement, satisfaction and discharge of any and all claims of plaintiff State against these defendants, or either of them, for or on account of the cutting and removing of said timber, and said sum was accepted and received by the plaintiff State in such full settlement, satisfaction and discharge of all such claims." (Printed Record, pp. 11-12.)

The defendants further pleaded that in the cutting and removal of the timber, and in all things done by them in or about the purchasing of the timber, procuring of extensions of time to cut the same, cutting and removing the same, and paying therefor, the defendants and each of them acted in entire good faith, and believing that the permit and the extensions thereof were valid and that thereby there was conferred upon the defendants the full and perfect right and authority to cut and remove the timber, and that the Board of Timber Commissioners and the several members thereof had full, ample and complete authority to do and perform the several acts done and performed by them, both individually and collectively as thereinbefore alleged.

The defendants further alleged that the State had kept and retained the money so paid to it by the defendants in settlement for the timber so cut and removed, and did not offer to return it or any part of it to the defendants, and had not obtained or sought the rescission of the transactions set forth in the answer in any court of law or equity, by reason whereof the defendants pleaded that the State was estopped and barred from maintaining the action.

As a further defense, and by way of set-off, the defendants pleaded all the facts hereinbefore recited, and the payment of the sum of money mentioned, and prayed that the

same might be set off against any claim that the State might be adjudged to have against the defendants or either of them on account of the cutting and removing of the timber. (See the answer, Printed Record, pp. 10-11-12.)

The State for its reply, admitted the citizenship of John F. Irwin as in the answer alleged, the sale of the timber, the making of the permit to cut the same, and the first extension thereof, which, as above stated, expired on the 1st of June, 1903; denied the good faith of the defendants in cutting the timber; admitted the payment of the various sums of money set forth in the answer in the manner therein designated, and that the State had kept and retained the money and had not offered to return the same, and by way of justification for keeping the money, pleaded that by the terms of the permit the defendants became indebted and were liable to pay the plaintiff for any and all timber which they had purchased under the permit, and had neglected and failed to cut prior to the expiration of the permit and the legal extension thereof, at the full permit price, and averred that the defendants paid the money "recognizing and acknowledging the liability that had accrued against them under the terms of said permit and the extension thereof, and under the laws of the State of Minnesota by reason of their failure and neglect to cut and remove the timber purchased by them within the life of said permit and the legal extension thereof."

Upon the issues so joined the parties went to trial, and before any testimony was introduced by the defendant in error, the plaintiffs in error interposed an objection to any evidence under the complaint, insisting that the law under which the action was brought was unconstitutional and void for the reasons set forth in the answer. (Printed Record, p. 18.)

It was stipulated upon the trial that the value of the timber at the time it was cut was \$6 per thousand feet. (Printed Record, pp. 18-19.) The case was tried before Honorable J. D. Ensign, District Judge, without a jury, on the 21st of November, 1906, and the learned judge made and filed his findings of fact in the case which are set forth on pages 33 to 37 of the printed record. By these findings of fact the court found the sale of the timber, the making of the permit and the extension thereof until the 1st day of June, 1903, and that at the time the permit was executed the defendants (plaintiffs in error here) paid to the State the sum of \$1,370.00, being 25 per cent of the appraised value of the timber sold, as provided by statute.

The seventh finding of fact is as follows:

"That in the winter of the years 1903-4, the defendants, acting and co-operating together, knowing that the plaintiff was the owner of said land and the timber thereon, and knowing that there had been one extension of said permit, as required by law, and that said extension had expired on the first day of June, 1903, entered upon said lands, and, as admitted by them, cut and removed therefrom 2,444,020 feet of pine timber, which pine timber at the time it was so cut and removed, as stipulated and agreed by the parties in open court when the evidence in said case was taken, was worth and of the reasonable price and value of six dollars (\$6.00) per thousand feet, board measure." (See Printed Record, p. 35.)

The Court further found that the timber was duly scaled and returned to the State Auditor by the Surveyor General of the Second Lumber District of the State of Minnesota, "and thereupon said Auditor erroneously computed the amount due from the defendants for said timber so cut and removed, as the contract price, or stumpage value thereof,

as though said permit was still in force, finding the same to be as follows:

Amount paid when permit was executed.....	\$1,370.00
Amount paid by State for scaling.....	147.20
Balance with 8 per cent one year.....	16,997.19

\$18,514.39"

Thereafter the State made its draft on the defendant Irwin for the said scaling fees and said \$16,997.19, aggregating \$17,144.39, and making the total amount paid by the defendants \$18,514.39, a sum which is still retained by the State and no part of which has been repaid to the defendants or either of them. (See Findings of Fact numbered VIII., IX. and X., Printed Record, p. 35.)

The Court further found that the value of the timber at the time it was cut and removed from the lands by the defendants at \$6 per thousand feet was \$14,664.12, and the treble value thereof \$43,992.36.

Upon these conclusions of fact the District Court held as a conclusion of law that the defendants and each of them were liable to the plaintiff for damages for wilfully, wrongfully and unlawfully entering upon the lands and cutting and removing therefrom the timber, in treble the agreed and stipulated value thereof, to-wit, \$43,992.36. But from this amount the Court deducted \$16,997.19 and ordered judgment for \$26,995.17, and judgment was entered accordingly. (Printed Record, p. 30.)

From this judgment the defendants appealed to the Supreme Court of the State of Minnesota. (Printed Record, p. 40.) Upon this appeal the constitutional objections to the law under which the action was brought, which are set forth in the assignments of error here (Printed Record, pp. 5-6), were again urged, and the Court adhered to its

decision hereinbefore referred to which had been made upon the appeal from the order overruling the demurrer. (Printed Record, p. 42.) But the Court further held upon the evidence in the case which was returned to it, that the defendants were not wilful trespassers, but that on the contrary, the record conclusively showed that they had reasonable grounds for believing that their permit had been further renewed, and honestly acted upon such belief. The evidence in the record, to which the Supreme Court referred, showed that the State Auditor upon application by the defendants for an extension of their permit, stated that he had no authority to make the extension (Record, p. 20), but that the matter would have to be acted upon by the State Timber Board; that he would refer the matter to them, and that he saw no reason why they should not grant the extension. The evidence was further to the effect that the office of the Shevlin-Carpenter Co. was afterwards informed by some one representing the Timber Board that the extension had been granted. (Record, p. 20.) It appeared that in fact the defendants did not know that the Timber Board had no authority to make a further extension of the permit after one extension had already been granted. The Timber Board's lack of authority was indeed not determined until the decision of the case at bar, and was entirely dependent upon the construction given by the Supreme Court of the state to a statute providing that the Timber Board might grant extensions of timber permits. The law which conferred the authority to make the extension is Section 24 of Chapter 163 of the Laws of 1895, and reads as follows:

"No permit shall be extended except by unanimous consent of the Board of Timber Commissioners, and under no circumstances shall an extension be granted

for more than one year, and then only for good and sufficient reasons. In case an extension is granted, a log mark shall be agreed upon for the third season."

It was the contention of the defendants that the authority to make an extension was not, by the language of the statute, necessarily limited to the period of one year, but that it fairly meant that other extensions could be made, but only for one year at a time. The Supreme Court, however, decided that it was the intention to limit the power of the Timber Commission to one extension of one year only. (Record, p. 45.) Nevertheless, the Court further held that under a proper construction of the statute under which recovery was sought by the State, the defendants were not guilty of a wilful trespass. It was decided, therefore, that since the defendants were liable only under the provisions of the statute for a casual and involuntary trespass, and hence liable only for double damages, judgment should not have been entered for treble damages, and the case was remanded with instructions to reduce the amount of the judgment to the single value of the timber cut and removed from the lands, since it had already been once paid for by the defendants.

The former opinion of the Court as to the constitutionality of the statute was adhered to and reaffirmed in all particulars. (Record, pp. 42 to 48.)

These plaintiffs in error then sued out a writ of error to the Supreme Court of Minnesota for the purpose of reviewing the judgment of the state court, inasmuch as its decision upon the constitutionality of the statute in question involved a construction of the federal constitution and its limitations upon the power of the state legislature.

THE ASSIGNMENTS OF ERROR.

"1. The said Supreme Court erred in holding that Section 7 of Chapter 163 of the General Laws of the State of Minnesota for the year 1895, was not in violation and contravention of that portion of the Fourteenth Amendment to the Constitution of the United States, wherein it is enacted and declared that no state shall deprive any person of life, liberty or property without due process of law, and in rendering final judgment against the plaintiffs in error in said cause by reason of such holding.

2. The said Supreme Court erred in holding that the provisions of said Section 7 of Chapter 163 of the Laws of Minnesota for the year 1895 were and are not in violation and in contravention of natural justice, and do not invade the natural rights of man which are protected by the fundamental principles of the social compact.

3. The said Supreme Court erred in holding that the provisions of Section 7 of Chapter 163 of the Laws of Minnesota for the year 1895 were not in violation and in contravention of natural justice, and do not invade the natural rights of man which are protected by the fundamental principles of the social compact and the Constitution of the United States.

4. That said Supreme Court erred in holding that the provisions of said Section 7 of Chapter 163 of the Laws of Minnesota for the year 1895 were and are not in violation and in contravention of the Constitution of the United States, and your petitioner alleges that said law is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it also abridges the privileges and immunities of citizens of the United States and denies to persons within its jurisdiction the equal protection of the laws.

5. The said Supreme Court erred in not reversing the judgment of the trial court and in not giving to plaintiffs in error their rights under the Constitution of the United States, as claimed and set forth in the record in said cause."

CONTENTIONS OF PLAINTIFFS IN ERROR.

Plaintiffs in error contend :

I.

That Section 7 of Chapter 163 must be considered in its entirety, and if any provision thereof is unconstitutional, the whole section falls.

II.

That the provision of the statute imposing double damages is penal and not remedial in its character.

III.

That this is a penal action, and since the plaintiffs in error are also subject to a punishment for the same acts under the provisions of the statute imposing a fine or imprisonment, the statute is unconstitutional, for under it the plaintiffs in error are subject to be put twice in jeopardy for the same offense.

IV.

That both the provision of Section 7 making the casual and involuntary trespasser liable to the state in double damages, and that declaring his act a felony, violate the provision of the Fourteenth Amendment that no person shall be deprived of liberty or property without due process of law.

V.

That these provisions cannot be justified nor saved from the operation of the Fourteenth Amendment as a proper exercise of the police power of the state.

ARGUMENT.

I.

SECTION 7 OF CHAPTER 163 MUST BE CONSIDERED IN ITS ENTIRETY, AND IF ANY PROVISION THEREOF IS UNCONSTITUTIONAL, THE WHOLE SECTION FALLS.

A.

The Legislature would not have passed the statute with either the clause of Section 7 making a trespass a felony, or the clause allowing double damages in case of a casual or involuntary trespass, eliminated.

To ascertain the legislative intent in enacting Chapter 163, inquiry may properly be made into the state of the law relating to the same subject at the time of its enactment and into the evils thought to exist and sought to be corrected as well. An investigation of this character will aid the Court in construing the language used in the statute we are considering, and in determining the inter-relation of its different parts.

The law relating to State lands and trespass thereon at the time Chapter 163 was passed is found in Chapter 38 of the General Statutes of 1894, more particularly in Title 1 of the Act. Chapter 38 was a fully worked out, systematic and complete act relating to the sale of State lands, the appraisal, the manner of conveyance, the rights of purchasers of such lands; and further providing for the cutting of timber thereon with permission from the State, and imposing certain penalties for trespasses. Section 3990 provided that any one committing a *wilful* trespass on State lands should be guilty of a misdemeanor and punished by a fine of not more than \$500 or imprisonment in the county jail for not more than one year, while Section 3992 provided a penalty to the amount of treble the value of the

timber taken for *wilful* trespass or single damages for casual and involuntary trespass. Nowhere in the act were there provisions for the punishment of a casual and involuntary trespass either as a felony or by the imposition of double damages upon the trespasser.

Chapter 163 provides that a casual and involuntary, as well as a wilful trespasser upon State lands, shall be guilty of a felony and punished by a fine of not more than \$1,000, or imprisonment in the penitentiary for not more than two years. Both these punishments are imposed if the trespass is wilful. These provisions are inconsistent with and therefore repeal Section 3990 of the old law. Further, Chapter 163 gives double damages to the State in the case of a casual and involuntary trespass and thus repeals Section 3992 of the old law with which it is inconsistent.

These changes are the salient and significant features of the law as re-enacted by Chapter 163, and they suggest at once the evils which the Legislature had in mind and which it sought to remedy. It was the belief of the Legislature at the time of the passage of the act that trespass upon State lands, especially those which contained valuable timber tracts, was only too frequent; and the inefficiency of the existing remedies and the failure of existing penalties and punishments to deter offenders were constantly being discussed. (99 Minn. 163.) This being so, the motive that impelled the Legislature to pass the new and enlarged act is obvious. It was the legislative intent in passing the law to prevent by more drastic penalties all trespass upon State lands. Chapter 163 is, like the old law, an act to safeguard State lands, but its distinguishing feature and the vital difference between the two acts are the provisions making an involuntary trespass a felony, and imposing upon the innocent trespasser a penalty in the form of double damages for his

act. Remove these provisions and there would remain no inducement for the Legislature to have enacted Section 7 of Chapter 163. In fact, they cannot be removed, nor either of them, and leave a law which would stand alone and which could be given effect to by the Court as the act of the Legislature.

B.

Where an invalid provision in a statute was the inducement to the act, or where the provisions of the act are so intimately connected with each other as to warrant the belief that the Legislature intended them as a whole, then the whole statute must fall.

Pollock v. Farmers' Loan & Trust Co., 158 U. S. 601, 635;

Poindexter v. Greenhow, 114 U. S. 270, 304;

Huber v. Martin, 127 Wis. 412;

Meyer v. Berlandi, 39 Minn. 438;

Commonwealth v. Harra (Mass.) 11 L. R. A., N. S., 799;

O. R. & N. Co. v. Smalley, 23 Pac. (Wash.) 1008;

Texas & Pacific R. Co. v. Mahaffey, 84 S. W. (Tex.) 646;

Sutherland on Statutory Construction, §§ 173-178.

In the *Pollock* case this Court, having decided that so much of the sections of the Income Tax Law as laid a tax upon income from real and personal property was invalid, proceeded to consider the effect of that conclusion upon the sections as a whole. The Court decided that since the sections in question constituted one entire scheme of taxation, they were necessarily rendered invalid by the presence of the unconstitutional provisions, and Mr. Chief Justice Fuller in the course of his opinion quoted with approval the following language used by Mr. Justice Matthews in *Poindexter v. Greenhow* at page 304 of the opinion in that case:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the Legislature, one they may never have been willing by itself to enact."

The Supreme Court of Minnesota in the case of *Meyer v. Berlandi* had before it the question of the constitutionality of the Mechanic's Lien Act of Minnesota, passed in 1887, and held certain provisions of the act providing for imprisonment for debt to be void. It was then necessary to decide whether the whole act should fall because of the presence of the invalid provision. The Court said, speaking by Mr. Justice Mitchell, on page 447:

"The great object of the act manifestly was to give greater rights and fuller protection to laborers and material-men than they had under the old law, and the provisions which we hold invalid were evidently those which the Legislature especially designed to effect that purpose, and which constituted the chief inducement to pass the act. It is hardly possible to conceive that, had the Legislature supposed that these provisions were invalid, they would have enacted the remainder of the act as a substitute for the old law. The whole act must therefore fall, leaving Gen. St. 1878, c. 90, still in full force."

It would be difficult to cite a case more exactly in point or to find language more applicable to the present situation than that just quoted. We deem it unnecessary to multiply authorities to support so well settled and so obvious a rule of statutory construction as the one which we have stated.

C.

The Supreme Court of Minnesota treated the provisions of Section 7 as inseparable, and considered the section as a whole.

Putting aside for a moment the considerations already dealt with, the question whether the various clauses of this section are separable is not open for determination by this Court. The Supreme Court of Minnesota, in the case at bar, has considered this very question, and in the construction which it gave to the section we have a sufficient and compelling reason for this court's treating it as an entirety.

Upon the appeal from the order overruling the defendants' demurrer to the complaint, the State urged upon the Supreme Court of Minnesota a construction of the statute, which, had it been accepted, would have obviated the necessity of a decision in regard to the validity of the clause making a casual and involuntary trespass a felony. The Attorney General contended, as we explained briefly in our statement of the case, among other things:

1st. That "while Section 7, Chapter 163, Laws 1895, provides that a casual and involuntary trespasser upon state lands is liable in double damages, a careful reading of the whole section and act will show that they are not susceptible to the interpretation put upon them by the appellants, but on the contrary it is very apparent that it is only wilful trespassers who can be subjected to the penalty prescribed in Section 7, namely, a fine not exceeding One Thousand Dollars, or imprisonment in the state prison not exceeding two years, or both;" and

2nd. That "even if, as contended, casual and involuntary trespassers can be subjected to the penalty, fine and imprisonment, prescribed in Section 7, and even if for that reason that portion of the section could be held unconstitutional as to that class of trespassers, the remainder of the section, which relates to wilful and casual and involuntary trespassers, could without doubt

be held constitutional, as the section with the portion relating to the penalty as to casual and involuntary trespass eliminated, would be in harmony in every particular with all the other sections of the act."

The Supreme Court, at the very outset of its opinion, took up the question of the construction of the statute. The defendants had insisted, as has already appeared, that the statute was unconstitutional because it made the casual or involuntary trespass a crime. The Court said:

"If susceptible of a construction to the effect that there was no intention on the part of the legislature to declare the casual or involuntary trespass a crime, one feature of defendant's position would be eliminated, and it is important to ascertain the intention of the statute in this respect. * * * * *

"By taking into consideration well-known facts leading up to the adoption of the statute in question, no difficulty is experienced in discovering the legislative will in this instance. The state is possessed of large tracts of timber lands of incalculable value, upon which designing persons have persistently trespassed, cutting and removing therefrom valuable pine timber. The state, through its officials, has been confronted with difficulties in detecting the guilty parties and bringing them to justice, and has been defrauded and robbed of large sums of money by their acts. It finally was thought necessary to enact a very stringent law to prevent future trespasses, and the drastic statute under consideration was the result. The statute exacts from the casual or involuntary trespasser double damages, and also declares his act a felony. The language of paragraph 2 will admit of no other view. It provides that any person who shall cut or remove timber from any lands of the state, contrary to the provisions of the statute, shall be guilty of a felony, and punished as there prescribed. No exception is found exempting the casual or involuntary trespasser from the penalty. That it was intended he should be criminally punished, in addition to the payment of double damages, is made

certain by that clause of the section which provides for both fine and imprisonment where the trespass is adjudged wilful."

The Court, having thus reviewed the considerations which led to the adoption of the law and having, as we believe, stated accurately the true intent of the Legislature and arrived at a proper conclusion in regard to the construction of the statute, made no attempt whatsoever to resolve the section into different parts; although, if it could have done so, it would have removed the necessity for a decision in regard to the constitutionality of the most stringent provision of this drastic law.

On the other hand, it considered at length the constitutionality of the whole act and of its different provisions. This will be seen from the following excerpts from the opinion. After adopting the construction which is arrived at in the passages quoted above, the Court said (see pages 164, 165 of the opinion in 99 Minnesota) :

"The legislature may declare that a wilful trespass upon the lands of another shall constitute a criminal offense and fix the limits of punishment therefor, either by fine or imprisonment, or by compensating the injured party in damages to be recovered in a civil action, or by both, as its judgment may dictate.

"Legislative provision for double or treble damages in such cases is sustained by many of the courts in this country. • * * * *

*"The act under consideration, in so far as it imposes a criminal punishment or double damages for the casual or involuntary trespass, dispenses with the necessity of proving a malicious or other wrongful purpose, and the pivotal question is whether the legislature could within constitutional restrictions, so enact. * * **

"The authorities cited justify the conclusion that the statute under consideration, in imposing a criminal punishment for the casual and involuntary trespass, is

within the limits of constitutional restrictions and valid. And if valid in that respect, it follows, *a fortiori*, that it was within the power of the legislature to award double damages for the same wrong. In so dispensing with the wrongful intent, the legislature violated no constitutional right of the citizen, and the statute must be enforced."

(The italics are ours.)

It is too clear to admit of controversy or to require further argument that the Supreme Court of Minnesota considered the statute as a whole and passed upon the constitutionality of each and every one of its provisions because it felt the truth of defendant's contention that the parts of the statute were inseparably interwoven one with another.

D.

This court is concluded by the construction of the statute adopted by the Supreme Court of Minnesota.

Gatewood v. North Carolina, 203 U. S. 531;

Armour Packing Co. v. Lacy, 200 U. S. 226;

Smiley v. Kansas, 196 U. S. 447.

The general rule of law that in determining the constitutionality of a state statute this Court will follow the construction given to it by the highest court of the State is too well settled to require any argument or elaboration, and we shall content ourselves with a reference to the case of *Gatewood v. North Carolina*, *supra*, which is exactly in point upon this proposition. There a statute of the State of North Carolina which had been passed upon by the Supreme Court of the State was before this Court for its consideration. The State Court had ruled that the provisions of the statute prohibiting the purchasing of a commodity on a margin and the carrying on of "bucket shops" for dealing in such commodity were separable, and that

therefore one convicted of carrying on a "bucket shop" could not successfully contend that the law was void as to him because certain presumptions created by the statute in regard to the prohibitions of purchasing on margins were repugnant to the Fourteenth Amendment. This Court said (by Mr. Justice White) :

"It is elementary that under the circumstances we must follow the construction given by the State Court and test the constitutionality of the statute under that view. * * * This ruling as to the separability of the statute is conclusive and refutes the contention that the entire law is void, even upon the hypothesis that the creation of presumptions as to one class not applicable to another class or classes was repugnant to the Fourteenth Amendment."

In this division of our argument we have endeavored briefly to show that Section 7 of Chapter 163 was intended by the Legislature to stand as an entirety and that it is composed of inseparable parts, none of which alone would express the intention of the law makers. Furthermore, we believe it has been demonstrated that those provisions of the section directed especially toward the casual and involuntary trespasser were the inducement to the passage of the act and that it cannot be said if either the clause imposing a double liability upon the innocent trespasser, or the one declaring him a felon were stricken out, that the section as it would then stand would have been enacted. Our object in entering upon a discussion of this question at the threshold of our inquiry, and before approaching the main issue as to the constitutionality of the statute, is that the Court may be thoroughly informed at the outset as to the nature of the statute and the interrelation of its different provisions. We desire that it should understand at once and beyond a doubt that the Supreme Court of Minnesota has

considered Section 7 in its entirety and has held that both the provision giving to the State double damages for the casual and involuntary trespass, and that making the innocent act a felony, are within the scope of the legislative power. In other words, the Court has held that the man who has taken timber from State lands, however innocently, even though it was through a mistake of fact, and even though he acted as in this case under a permit which he thought was valid, may be penalized by the State in double the value of the timber which he took, and may further be fined \$1,000 for the same act, or in the discretion of the Court may be sentenced to two years confinement in the State penitentiary. The words "casual and involuntary" seem aptly chosen to describe an innocent act, but here, according to the decision of the Minnesota Supreme Court, they properly describe an act which is a felony. Is it possible for the Legislature of Minnesota to create this strange anomaly a "casual and involuntary" felony?

These, then, are the questions which this Court has to decide and which we shall deal with in this brief: Was the Supreme Court of Minnesota right in its decision that the provisions of Section 7 exacting double damages from the innocent trespasser, and the one making such a trespass a felony, are constitutional?

These two provisions are so alike in nature, and the objections we shall urge against them are so similar, that for the convenience of our argument we shall attempt no separate treatment. The proposition that the provision relating to the so-called "double damages" is essentially penal and not remedial, and is therefore identical in character with the clause making the trespass a felony and equally vicious, will be dealt with in the next subdivision of this brief.

II.

THE PROVISION OF THE STATUTE IMPOSING DOUBLE DAMAGES IS PENAL AND NOT REMEDIAL IN ITS CHARACTER.

If it were open for this Court to consider whether the clause of Section 7 which declares a casual and involuntary trespass a felony could be stricken out as unconstitutional, leaving the remainder of the section to stand, and if the Court should determine that the felony clause could be stricken out without impairing the validity of the other provisions of the section, it would still be necessary to examine the nature of the so-called damages given to the State by the act and determine whether they are not in truth a penalty imposed irrespective of the damages actually suffered by the State, and as a punishment for an alleged public offense. If this be so, then the provision for double damages is essentially penal, and it follows that this action, though civil in form, is in substance criminal. The provision in question then becomes obnoxious for the same reasons as that part of the section declaring the trespasser a felon, for it also attempts to impose a punishment upon an innocent person. Furthermore, if it is penal and if, as we believe, the statute must be treated as an entirety, then, as we shall hereafter argue, the statute is obnoxious to the Fourteenth Amendment of the Constitution for the reason that under it the innocent trespasser may twice suffer punishment for the same acts.

At present, however, we will concern ourselves merely with the question whether or not the imposition of double damages is penal or is intended only to give a remedy to the State for damages actually suffered.

A.

In determining whether or not an action is civil or criminal in its nature the form of action is immaterial. The test is whether it is to punish a public offense or to redress a private injury.

United States v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688;
Coffey v. United States, 116 U. S. 436;
Boyd v. United States, 116 U. S. 616;
Wisconsin v. Pelican Insurance Co., 127 U. S. 265;
Huntington v. Attril, 146 U. S. 657;
Lees v. United States, 150 U. S. 476;
United States v. One Distillery, 43 Fed. 846, 852;
United States v. Shapleigh, 54 Fed. 126;
A. T. & S. F. Railway v. United States, 172 Fed. 194.

In determining whether or not this provision is penal, the form of the action by which the damages imposed may be recovered under the statute is immaterial. If the State is actually seeking to inflict a punishment for an alleged offense, it cannot be said that the Legislature merely by calling the penalty which it is sought to impose double damages and making it recoverable by a civil action, can change its essential character and differentiate it from a fine or other punishment imposed upon a person convicted in a criminal prosecution. If the Legislature could do this, it could in effect by the substitution of civil for criminal forms, nullify all of these safeguards which our law has properly raised around one accused of a public offense or a crime. To assume the position that the Legislature has power to do this would also lead logically to the conclusion that it might impose not double nor treble, but ten-fold or hundred-fold damages in such a case; and by merely calling them damages deprive them of all the qualities of

finer or penalties; for the difference between the imposition of double damages and the exaction of hundred-fold damages would be one of degree and not of quality. In neither instance does the principle of compensation, a distinguishing feature of true damages, justify the amount declared by the statute to be recoverable. In both cases there is obviously present the element of penalty. Both are for the purpose of mulcting the defendant for an offense.

The test which determines whether a case is criminal or civil is, as we have said, not in the form of the proceeding. It may be civil in form and criminal in fact. The test is whether the purpose of the suit or proceeding is to vindicate private right or to punish a public wrong. If the latter, then no matter what the form of the proceeding, it is criminal.

Huntington v. Attril, 146 U. S. 657, is undoubtedly entitled to first place as an authority upon the distinction between civil rights and remedies, and penalties and penal actions in the strict sense. It discusses the questions involved in a very broad and comprehensive way, and cites a large number of authorities. The conclusions reached are fairly summarized in the following brief quotation (page 683):

"The test is not by what name the statute is called by the legislature or the courts of the state in which it was passed, but whether it appears to the tribunal which is called upon to enforce it to be, in its essential character and effect, a punishment of an offense against the public, or a grant of a civil right to a private person."

In the case of *Boyd v. United States*, 116 U. S., at page 616, the Court had under consideration a proceeding in rem to establish a forfeiture of certain goods alleged to have been fraudulently imported without paying the duties thereon. The question arose whether this proceeding was a

"criminal case" within the meaning of that part of the Fifth Amendment of the Constitution which declares that no person "shall be compelled in any criminal case to be a witness against himself." At pages 633 and 634 the Court said:

"We are also clearly of the opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture, as declared in the 12th section of the Act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue, which are made criminal by the statute, and it is declared that the offender shall be fined not exceeding five thousand dollars, nor less than fifty dollars, or be imprisoned not exceeding two years, or both: and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants, that is, civil in form, can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or as an alternative a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one."

In the case at bar, as in the *Boyd* case, that which we assert is a penalty, that is the double damages, are affixed to acts which are declared criminal.

In the case of *Lees v. United States*, 150 U. S. 476, this Court was confronted with the question of whether an action civil in form to recover a penalty for importing an

alien under contract to perform labor in violation of the Act of February 26th, 1885, was civil or criminal in its nature. Mr. Justice Brewer, on page 480 of the opinion, said:

"This, though an action civil in form, is unquestionably criminal in its nature, and in such a case defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of *Boyd v. United States*, 116 U. S. 616."

A case which is decidedly in point is that of *The United States v. Shapleigh*, 54 Fed. 126, in which Judge Sanborn delivered the opinion of the Circuit Court of Appeals of the Eighth Circuit, in regard to the character of a suit to recover certain penalties under Section 3490 of the Revised Statutes. Section 5438 provides that every person who makes a claim against the Government of the United States, knowing such claim to be false, fictitious or fraudulent, or who uses any false bill, receipt, voucher, etc., for the purpose of securing the payment of the false claim, shall be imprisoned at hard labor for not less than one, or more than five years, or fined not less than one thousand or more than five thousand dollars. Section 3490 provides that any person who commits any of the acts prohibited by the provisions of Section 5438 shall forfeit and pay to the United States the sum of \$2,000, and in addition double the amount of damages which the United States may have sustained by reason of the doing or committing of such act, together with the costs of the suit. *Shapleigh* was proceeded against under Section 3490 by the Government to recover the penalty provided thereby and the double damages allowed. The question was raised in the Court of Appeals upon error to the District Court, as to the propriety of a charge in the court below to the effect that the law presumes the defend-

ant to be innocent and that the Government must prove its case beyond a reasonable doubt. The Court of Appeals held that the suit was in its nature criminal. The case seems an exact parallel to the case at bar. Judge Sanborn said (on pages 129 and 134) :

"Now if the government enacts a statute which provides that a case in its nature criminal, whose purpose is punishment, whose prosecutor is the state, and whose successful prosecution disgraces the defendant, and forfeits his property to the state as a punishment for crime, may be brought in the form of a civil suit, does that change the rule of evidence that ought to be applied to it? If a state provides that all proceedings for the punishment of crime shall be conducted in the form of civil suits, does that change their nature, or the amount of evidence that ought to be required to convict the defendants of the crimes? Is a wolf in sheep's clothing a wolf or a sheep? Take the case at bar. The crimes with which the defendant was charged were felonies. The government might have proceeded by indictment to punish him for them under section 5438. If it had done so, its case must have been proved beyond a reasonable doubt. It elected to proceed under section 3490, by a civil suit, to recover over \$300,000 in penalties, to punish the defendant for the same crime. The penalties sought to be inflicted by the latter proceeding are far heavier than any that the court would probably have inflicted under the former. In each proceeding the same government, with its unlimited resources, proceeds against the same citizen to punish him for the same crimes, and in each the single question for the jury to determine is, was this defendant guilty of these felonies? * * * The United States might have maintained a civil suit for the single damages it sustained, if any, from the wrongful acts of the defendant charged in this complaint without establishing its case beyond a reasonable doubt. Such a suit would have been a civil suit in its nature and purpose as well as in its form. The action at bar is a

civil suit in form; but when, under the form of this civil suit, the government sought to punish this defendant for felonies by recovering the penalty of double damages and \$2,000 for each offense, it made this proceeding criminal in its nature and purpose, and invoked the application to it of the rules of evidence applicable to criminal trials. While civil in form, all its other characteristics were those of a criminal case; its prosecutor was the government; its purpose was punishment; the defendant's conviction of a felony was essential to the plaintiff's recovery; the defendant's character and property were in jeopardy, because the government sought to punish him in this suit; and the verdict and judgment here would be a bar to any criminal prosecution for the same offense."

The very recent case of *A. T. & S. F. Railway Co. v. United States*, decided in the Circuit Court of Appeals for the Seventh Circuit and reported in 172 Federal, at page 194, follows the decision of this Court in the Boyd case and the Lees case and decides that a suit by the United States against a railroad company under the Safety Appliance Act to recover the penalty imposed by Section 4 of that act for using a car in interstate commerce that is not provided with secure grab irons, while civil in form, is in effect a criminal prosecution, and the trial court is therefore without power to direct a verdict against the defendant. It seems very clear from this line of authorities, which might be extended indefinitely, that this Court has consistently held that the form of an action was not conclusive as to its nature, but that the test is in every case whether the action is for the protection of the public or merely of private rights. The cases which we have cited above seem very much in point upon the case at bar, and the Shapleigh case especially, indeed, is almost an exact analogy to our situation.

B.

The double damages imposed by Section 7 upon the trespasser are a punishment for an alleged public offense, and the provision is penal in its nature.

The damages so-called which are inflicted by the statute upon the casual and involuntary trespasser on State lands cannot be inflicted as exemplary or punitive damages. The latter *ex vi termini* are imposed only where an element of malice or wilfulness or negligence enters into the doing of the act by the defendant. There are, it is true, two distinct and widely divergent opinions in this country as to the nature of exemplary damages. One line of authorities holds that exemplary or punitive damages are imposed only by way of punishment on behalf of the State or to deter others from committing similar wrongs. The other cases representing the weight of authority, perhaps, hold that such damages are given as additional compensation for the injuries to the feelings of the outraged individuals, and not as a punishment in any sense. The Supreme Court of Minnesota holds to the latter rule. *Boetcher v. Staples*, 27 Minn. 308. This Court, on the contrary, has always spoken of exemplary damages as penal in their nature inflicted as a punishment. It is enough to refer to the case of *Missouri Pacific R. Co. v. Humes*, 115 U. S. 512, where the Court said, in upholding a statute imposing double liability upon a railroad for damages to stock on its road occasioned by the failure to construct fences: "For injuries resulting from a neglect of duties in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. * * * The additional damages being by way of punishment, it is clear that the amount may be thus fixed. * * * The statute only fixes the amount of the penalty in damages proportionate to the injury inflicted."

And in *Lake Shore Railway Co. v. Prentice*, 147 U. S. 101, this Court, speaking by Mr. Justice Gray, said that "Exemplary or punitive damages being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offense."

It would seem that on no possible theory could damages as such ever be allowed to or recovered by the State in excess of actual compensation for the injury. Even assuming that this Court should adopt for the purposes of this case the theory of the Minnesota Court that exemplary damages are inflicted as a salve to the injured feelings of the plaintiff and not as a punishment, and that it should hold that the case of a casual and involuntary trespass, without the element of malice or negligence (which alone, we believe, justifies the imposition of exemplary damages) was a proper one for their infliction; it is impossible to apply that theory here for this reason: The State has no motive such as an outraged individual may have for the recovery in the way of damages of more than the amount of its injury. It has no injured feelings, no outraged sensibilities; it is not inflicting a punishment for any satisfaction to itself—monetary or otherwise—but primarily for the good of society and secondarily for the reformation of the criminal. The courts which adopt the view embraced by the Minnesota Supreme Court in regard to exemplary damages recognize in the citizen the presence of human passions and resentments; that he suffers mentally as well as physically; that he has in some cases a besmirched name and a lost reputation to be compensated for, and they permit a jury to inflict punishment for the wrongs of the plaintiff as a person. These factors are all absent in a case where the State

is an aggrieved party. It can have no interest, such as a private person might feel, in recovering more than the actual amount of the injury.

It may be well at this point to call attention to the fact that in all those states where the courts hold that punitive damages are inflicted only as a punishment, it is held that they cannot be allowed in any case where the same offense is punishable by a fine and imprisonment, because as exemplary damages are and can be inflicted only as a punishment by the State, to allow them in such cases would be inflicting double punishment. The leading case on this point is *Fay v. Parker*, 53 N. H. 342, where all the authorities are exhaustively reviewed and considered.

We have referred thus briefly to the matter of exemplary damages for the reason that the state may attempt to draw some analogy between them and the provision here in question, although the penalties are respectively imposed upon acts which differ essentially in their characteristics—one being wilful or malicious, the other innocent. Assuming the provision for treble damages for a wilful trespass to be an instance of punitive or exemplary damages (and we think it probable that in some degree the Legislature was moved to impose the three-fold penalty by considerations similar to those which usually justify such damages) we believe it follows from the doctrine as laid down in this Court that even that provision will be considered penal in the sense that it is a punishment and not compensation. Going a step further and conceding that this Court might adopt the view which is embraced by the Minnesota Court in regard to exemplary damages; that is, that they are given solely as compensation, nevertheless that is not the only element which is present even in the treble damage clause as appears by the construction given to it by the Supreme

Court of Minnesota in the case of the *State v. Buckman*, 95 Minn. 272. It was there held that the treble damages, so-called, included both exemplary damages and a penalty in the stricter sense. If that clause is penal in any degree *a fortiori* is the one imposing double damages for the casual trespass, for in the case of the latter, all excuse for imposing enhanced damages as such is absent. Conceding the damages exacted from the wilful trespasser are such as may be called exemplary or punitive at least in part, and that they may therefore be so far regarded as compensation pure and simple, according to the view of the Minnesota Supreme Court, nevertheless the provision for double damages is essentially different. There can be no claim that the penalty in that case is given to the State as a solatium for the malice or fraud which aggravates the injury, for the act characterized by these qualities is expressly punished by the other provisions of the statute and excluded from the operation of this.

The distinction between the cases in which exemplary damages may be allowed and those in which they cannot be given is clearly recognized by the Supreme Court of Minnesota in *State v. Buckman*, 95 Minn. 272, where the Court said (page 276 of the opinion): "The law recognizes but two distinct elements of compensation where damages are awarded for the redress of wrongs—one the established common-law rule, which gives for the wrong suffered the actual value of the property taken; another where malice, aggravation, oppression and deceit characterize the injury, in which case additional or enhanced damages are authorized as a solatium to the party wronged, and also as a punishment to the wrongdoer."

Putting aside for the time being all consideration of the Legislature's constitutional power to punish an innocent act,

apart from certain instances within the police power, it is obvious that in Section 7 of Chapter 163 they have at any rate attempted to punish such an act.

But if there were any doubt upon the question whether this provision relating to the casual trespass is penal in the sense of being solely a punishment for an offense, it is removed by the decision of the Supreme Court of Minnesota in the case of *State v. Buckman, supra*. That was an action brought by the State to recover upon three causes of action for logs unlawfully cut from State land. In the first two claims it was alleged that the defendant's trespass was knowing and wilful, and treble damages were sought. In the third cause of action the allegation of knowledge was omitted and double damages only were demanded. The suit was based upon the very section the validity of which is here in dispute. The defendant demurred to the complaint and the trial court sustained the demurrer upon the ground that since the alleged trespasses occurred more than three years prior to the commencement of the suit, it was barred under Section 5127 of the General Statutes of Minnesota for 1894, which provides that an action cannot after that period be maintained upon a statute for a penalty or forfeiture where it is given to the party aggrieved or to such party and the State. In the Supreme Court the Attorney General contended that although the statute might be highly penal in its nature, still that was not sufficient to make it a penalty within the meaning of Section 5137. The position of the Attorney General is evident from the following passage taken from the opinion of the Court found on page 275 of 95 Minnesota:

"The conclusion of the learned trial court sustaining the demurrer is contested with much ability by counsel for the state, whose contention may be sum-

marized as follows: The statute (Laws 1895, c. 163, section 7) upon which the act is founded provides for enhanced damages above the value of the stumpage which the state, to protect its proprietary interest and safeguard its rights in its timber lands, made highly penal; but that such statutory right of recovery did not constitute, in the strict sense of the term, a penalty, within the limitation acts of this state, since a penalty *ex vi termini* under proper legal definition of that precise term by a correct construction of the statutes themselves must be treated as a punishment for an offense, rather than compensatory redress for wrongs sustained from trespasses upon the state property, and referring to the three distinct references in the limitation statutes to the word 'penalty.' "

The Court, after considering the contention of the Attorney General at some length, decided that the provisions of Section 7, both as to treble damages and as to double damages, were penal and therefore that the causes of action were barred by the three-year statute of limitations. The Court said:

"The conclusion is, however, very logical, and necessarily has much force, that the state might desire to impose penal consequences upon trespassers on its domain, particularly when it is taken into consideration that the state, in view of its interest and the difficulty of guarding its lands, has a peculiar interest in protecting the same from invasion by trespassers who might otherwise have a more than ordinary temptation to make depredations thereon. * * * And while it might have been the purpose of the state to liquidate in the statutory provision on which this action is founded the damages to be awarded for inexcusable and wilful wrongs, it was also its purpose to provide for the state's protection for involuntary trespasses. * * * Our review of the subject, while it impresses us with force that the view that the legislature might have intended to liquidate a claim for the wrongful character of the injury to the state upon the theory of providing

exemplary damages, has also led us to the necessary and essential conclusion that this is not the only element within the statute upon which the theory can be sustained; that the provision for redress embraces and comprehends within its purview and scope distinctly the idea of a penalty.

"Recurring again to the statute referred to, we find that treble damages are therein allowed where the element which authorizes the recovery is wrongful, remembering that it is in such cases only without the statute that exemplary damages or smart money can be given. The act of 1895, under which this action is maintained, further provides that in every action where the sovereign rights of the state are interfered with by trespassers double damages are to be allowed for each involuntary taking. Thus it appears that between what would justify punitive damages and the actual value of the property or compensation pure and simple a sum to be recovered is given that cannot possibly be for any other conceivable purpose than punishment solely; in other words, a penalty. * * * The compensation for double damages in the statute so clearly indicates the explicit feature of penalty that it requires us to hold that this substantial and controlling element determines that the three-year period of limitation in section 5136, *supra*, applies."

No language could more clearly express the contention of the plaintiffs in error that this action is one to recover a penalty and not exemplary damages by way of compensation. The Court said in the Buckman case that double damages could not possibly be "for any other conceivable purpose than punishment solely; in other words, a penalty." We have taken the liberty of making somewhat extended quotations from this case because we consider it of the greatest importance in the case at bar. The Buckman decision was urged upon the Minnesota Supreme Court very strongly by plaintiffs in error in this case, but it was neither

followed, disapproved, distinguished, nor in any way referred to by the Court in its opinion. The Court contented itself with a somewhat contradictory and obscure discussion of the word penalty and of the nature of the action. It was apparently oblivious of the fact that it had held in the Buckman case that the double damages given by the section were not exemplary damages in any sense whatever and could be construed, as is said in the quotation we have just made, only as a punishment; in other words, as a penalty. The Court assumes in its opinion in 99 Minnesota, at page 168, that the whole question involved is whether *exemplary damages* are in such sense a penalty as to make the action in effect a criminal one. We quote from the opinion:

"Whatever, in legal contemplation, exemplary damages may be, whether properly termed aggravated relief, or a penalty pure and simple, they are not imposed in the sense of or as a substitute for criminal punishment, but rather as enlarged damages for a civil wrong. No sound reason occurs to us why the state in preservation of the property intrusted to it for the use and benefit of the people, should not be granted all remedies that are afforded and extended individuals in the protection of their property and property rights. * * * Respecting the right of the state to maintain a civil action to recover exemplary damages, we entertain no serious doubt; in matters involving its proprietary or business functions, the state occupies the same position in the courts as private suitors."

The language we have just quoted might be proper enough with reference to the ordinary case of exemplary damages, if we adopt the view of such damages embraced by the Minnesota Court, but it had no application whatever to the situation in hand, for the Court was not dealing with a case of exemplary damages. It seems to result necessarily from

the discussion by Mr. Justice Brown that the double damage provision is for some purposes a penalty, while for others it may be considered merely as exemplary damages.

The Attorney General will undoubtedly argue, relying upon some of the language used by the Court upon the first appeal that this is not a punishment for a public offense which has been imposed by the State, but that the State was acting in a proprietary capacity, as the owner of property, and not as a sovereign. There is certain language in the opinion in 99 Minnesota which shows that the Court had in mind the difficulty of allowing the State as a sovereign to inflict a punishment twice for a public offense or to inflict any punishment whatsoever in this form of action, and that it therefore endeavored to present the State in the aspect of a private individual seeking to redress a private grievance. It argued that the State in the preservation of its property should be granted all the remedies that are afforded individuals in the protection of their property, and that in matters involving its proprietary functions the State occupied the same position in the Court as a private suitor. These are propositions which do not admit of controversy, but that the State was acting in its proprietary function in inflicting this penalty of double damages upon the casual trespasser, or that the private landowner might be given these damages for the innocent trespass are very different conclusions, and yet that is what the Court in effect decided. This is entirely at variance with the attitude of the same court in the Buckman case, for there, as we have just shown, the Court held that the object of an action identical with this in character, brought to recover damages under the same provisions of the statute, was to punish the trespasser for a public offense.

Upon no other ground, it said, could the provision for double damages for the casual and involuntary trespass be explained.

If it should be suggested, or should appear to the Court, that in the case at bar the Supreme Court of Minnesota practically overruled *State v. Buckman*, *supra*, we call the Court's attention to the case of *State v. Clarke*, in which an opinion was handed down by the Supreme Court of Minnesota on the 12th of November, 1909, but is not yet published, wherein the Court cites *State v. Buckman* as an authority to sustain its position in *State v. Clarke*. That case was exactly like the case at bar except that in *State v. Clarke* more than three years had elapsed before the suit was commenced, and the Court held that plaintiff could only recover the single value of the timber taken because the statute had run against the penalty of double damages, and it was to this proposition that *State v. Buckman* was cited.

These two points of view assumed by the Court cannot be reconciled. The State cannot at the same time and in the same action punish a public offense and exact redress for a private wrong. What the State has in fact endeavored to do is to use its power as a sovereign, its police power to protect the public, in an attempt to protect its own private property. This circumstance has caused the confusion of thought apparent in the decision from which we have been quoting. As we shall show hereafter, the attempt on the part of a sovereign to punish a purely private wrong as a public offense is unconstitutional. It cannot use the machinery of public prosecution for private purposes. If in this case, for example, the landowner were a private citizen, it would very clearly be beyond the power of the State to take from the innocent trespasser any amount over and above adequate compensation as a forfeiture.

The position of the State and of the Minnesota Court may indeed be reduced to this:

First—The State is here punishing a public offense, and it is justified in dispensing with the element of intent because of public exigency, as an exercise of the police power.

Second—The State is here acting as an individual proprietor, and therefore the action is not to inflict punishment, but is merely to recover damages.

An accurate statement, as we believe, of the nature of the action is that the State is proceeding as a sovereign to inflict a punishment upon one who has committed an innocent act, which, under an attempted exercise of the police power, the State has declared a felony, and the act which it is thus sought to punish is in fact an injury to the State in its proprietary capacity. In other words, the State is attempting to punish a private grievance as a public offense. We shall show later on that the police power has never been so broadly construed as to justify such an attempt, and we shall further discuss the question whether or not the State is acting as a sovereign or merely in its proprietary capacity. But dismissing this topic for the time being, we pass to a consideration of one of the results which inevitably flows from the fact that this is a penal action.

III.

THIS IS A PENAL ACTION, AND SINCE THE PLAINTIFFS IN ERROR ARE ALSO SUBJECT TO A PUNISHMENT FOR THE SAME ACTS UNDER THE PROVISIONS OF THE STATUTE IMPOSING A FINE OR IMPRISONMENT, THE STATUTE IS UNCONSTITUTIONAL, FOR UNDER IT THE PLAINTIFFS IN ERROR ARE SUBJECT TO BE PUT TWICE IN JEOPARDY FOR THE SAME OFFENSE.

A.

The plaintiffs in error may properly raise this objection.

Section 7 provides for two punishments: First, the penalty of double damages recoverable in a civil action; secondly, a fine of \$1,000 or imprisonment for not more than two years in the State penitentiary. These punishments are imposed upon the casual and involuntary trespasser for one and the same act. In the case at bar when the plaintiffs in error took the timber from the State lands, believing they did so under a valid permit, as the Supreme Court found, under the statute they became at once liable to the infliction of both of these punishments. It is true that as yet the State has proceeded against them only under the first clause of the act, but if this Court decides that it is constitutional, there is nothing to prevent a criminal prosecution being immediately instituted against them which may result in the imposition of a thousand dollar fine upon the corporation and the imprisonment of Mr. Irwin in the penitentiary for two years.

It may be urged that inasmuch as plaintiffs in error have not yet been prosecuted criminally, they are not in a position to question the validity of the statute on that score. This suggestion is obviously unsound. If it were adopted, we might have the anomaly of a conviction in the present

action under a statute which afterward, in a criminal prosecution against the same parties, this Court declared unconstitutional in its entirety. Under this view the Court will be forced to allow these plaintiffs in error to be penalized under the provisions of the statute which the Court may be clearly convinced is unconstitutional, and by which the plaintiffs in error might hereafter suffer. Further, this construction would make the validity of the statute dependent upon the will of the prosecutor as to whether he shall hereafter institute a criminal prosecution against the plaintiffs in error; in other words, if the State is content to impose this penalty only, the statute is constitutional, but if it seeks to exact a further punishment, the whole statute is invalid.

We desire to reiterate our contention that the statute must be considered in its entirety as it was considered by the Supreme Court of Minnesota. If the statute were separable and the felony clause alone could be stricken out, leaving the rest to stand, then it is admitted that this Court would not necessarily have to deal with the objection we are now urging. It might properly reply to any such contention on the part of the plaintiffs in error that the time to raise such a question would be in a prosecution under the felony clause, and that then if the Court should decide that clause to be objectionable, on the ground that it imposed a second punishment for the same offense, it could be declared unconstitutional, leaving untouched the provisions under which the present proceeding is brought. This, however, is not the case, and a future decision against the validity of the felony clause would, as we have shown, strike down the whole statute, including that portion which is the basis of the present action. It seems clear, therefore, that the plaintiffs in error are in a position to urge this point at the present time.

In *Moore v. People of the State of Illinois*, 14 How. 13, where the plaintiff in error was indicted and convicted under the Criminal Code of Illinois for harboring and secreting a negro slave, there was a Federal Act providing for the punishment of the same acts. The case decided that the same act may be an offense against the law of the State and against another law of the United States, and that one prosecuted under the law of the State cannot set up as a defense that he is subject to be placed twice in jeopardy because he may thereafter be convicted under the Federal statute for the same act. The point we wish to make in regard to the case is that the Court did not refuse to consider Moore's objection on the ground that he had not as yet been convicted under the Federal law, but that it decided what the effect of a second conviction would be and whether it would or would not put the plaintiff in error in jeopardy again for the same offense. The case seems to furnish an analogy to the case at bar.

An examination of that class of cases which hold that exemplary damages may not be allowed in a civil action where defendant is also liable to be criminally prosecuted for the same acts, will show that it has been uniformly determined that the imposition of such damages subjected the defendant to double punishment for an offense in spite of the fact that he had not yet suffered the second punishment. It was enough that he might. In the following cases the defendant had not yet been proceeded against criminally, yet the Court refused to allow the imposition of punitive damages:

Fay v. Parker, 53 N. H. 342, 390;
Austin v. Wilson, 4 Cush. 273;
Taber v. Hutson, 5 Ind. 322, 325;
Koerner v. Oberly, 56 Ind. 284, 287;
Shafer v. Smith, 63 Ind. 226, 228.

The objection that the plaintiffs in error are not in a position to raise the question was made by the State before the Minnesota Court upon the first appeal, and while that Court without giving the objection much consideration in its opinion seemed somewhat doubtful as to its possible force, it passed the argument by and decided the matter upon the merits, expressly reaching the conclusion that the provision for double damages in a civil action, and for fine and imprisonment in a criminal prosecution, do not subject the trespasser to double jeopardy. The Court suggested that the defendant was premature in raising the point. It then went on: "But we do not dispose of the question upon this ground. Upon its merits the Courts are not in entire harmony," etc. After a somewhat extended discussion the Court then arrives at the conclusion that the statute does not place the plaintiffs in error in double jeopardy.

The present case is readily distinguishable from those cases in which it is held that only those may complain that a statute is unconstitutional who belong to the class whose rights are menaced.

Lee v. New Jersey, 207 U. S. 67;

Hatch v. Reardon, 204 U. S. 152.

Here the plaintiffs in error belong to the class who are subject to the drastic and objectionable features of the act. They are guilty of a casual and involuntary trespass and subject to the two penalties provided for such trespassers.

B.

A statute which places persons twice in jeopardy for the same offense does not satisfy the requirements of due process of law and further deprives them of a privilege and immunity guaranteed under the Federal Constitution.

Ex parte Lang, 18 Wall. 163;

Ex parte Ulrich, 42 Fed. 587;

Moore v. People, 14 How. 13.

In order to prevent any possible misconception as to the scope of our argument, it may be said that we do not rely upon the protection of Article V. of the Amendments to the Constitution, which provides that no person shall be subject for the same offense to be twice put in jeopardy of life and limb. Of course, it has long been well settled that not only Article V., but all of the first ten amendments operate only upon the action of Congress and are not in any degree limitations upon the power of the States. It has further been held that the following alleged rights of citizenship protected against the action of the Federal Government by the first ten amendments are not privileges and immunities of Federal citizenship protected by the Fourteenth Amendment: The right to assemble peaceably for a lawful purpose—*United States v. Cruikshank*, 92 U. S. 542; the right to trial by jury in civil cases—*Walker v. Sawvnet*, 92 U. S. 90; the right to bear arms—*Presser v. Illinois*, 116 U. S. 252; the necessity of indictment by grand jury before prosecution for a felony—*Hurtado v. California*, 110 U. S. 516; and of trial by jury in a prosecution for a felony—*Maxwell v. Dow*, 176 U. S. 581; the right to be confronted by witnesses—*West v. Louisiana*, 194 U. S. 258; and in the latest case in this Court in which the scope of the privilege and immunity clause of the Fourteenth Amendment has been discussed—that of *Twining v. New Jersey*,

211 U. S. 78; the right of an accused not to be compelled to testify against himself was held to be unprotected as a privilege and immunity of Federal citizenship.

The question whether the placing of a person twice in jeopardy for the same offense is a deprivation of a privilege and immunity under the Constitution has never been decided. We concede that its enumeration among the other rights protected from Federal action by the first ten amendments does not necessarily mean that it is such a privilege or immunity, although we concede this reluctantly and only in view of the long line of authorities; but irrespective of the Fifth Amendment, the right is so fundamental, so inherent a principle of our system of jurisprudence, its violation is so shocking to the sense of justice and so abhorrent to the whole spirit of our government that it must surely be within those privileges and immunities protected by the Fourteenth Amendment. We do not believe that this Court will limit the operation of that amendment to the extent feared by Mr. Justice Harlan. (See the dissenting opinion in *Twining v. New Jersey*, *supra*.)

But we prefer to rest our present argument against the constitutionality of the statute chiefly upon that clause of the Fourteenth Amendment forbidding the States to deprive any person of life, liberty or property without due process of law. It has often been decided by the Federal Courts that a proceeding by which a person was placed in jeopardy a second time for the same offense was unconstitutional. Many of these decisions involve Federal statutes and Federal proceedings, and in them the courts merely applied the Fifth Amendment, which is operative only upon action by the Federal Government, but even in some of these

cases it is evident that the Court would have reached the same conclusion under the provisions of the Fourteenth Amendment.

At any rate, that the requirements of due process of law prohibit placing a person twice in jeopardy for the same offense was squarely decided in *Ex parte Lang*, 18 Wall. 163. In that case Lang, who petitioned the Supreme Court for a writ of habeas corpus, had been indicted under an act of Congress for stealing certain mail bags belonging to the Post Office Department. Upon trial the jury found him guilty. The punishment for the offense as provided by the statute was imprisonment for not more than one year, or a fine of not less than ten or more than two hundred dollars. The presiding justice sentenced the prisoner to one year's imprisonment and to pay a \$200 fine. Later the prisoner was brought before the Court, the same judge presiding; an order was entered vacating the former judgment, and the prisoner was again sentenced to one year's imprisonment from that date. The Court held that the imposition of a second judgment constituted a second punishment for the same crime or misdemeanor, and therefore was repugnant to the provisions of the Constitution. Mr. Justice Miller said, upon page 168 of the opinion of the Court:

"If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

And again upon page 170, referring to the language of the Fifth Amendment, he said:

"It is not necessary in this case to insist that other cases besides those involving life or limb are positively covered by the language of this amendment; or that when a party has had a fair trial before a competent court and jury, and has been convicted, that any excess of punishment deprives him of liberty or property *without due course of law*. On the other hand it would seem to be equally difficult to maintain, after what we have said of the inflexible rules of the common law against a person being twice punished for the same offense, that such a second punishment as is pronounced in this case is not a violation of that provision of the Constitution."

And on page 172 of his opinion, referring to the case of *Moore v. People of Illinois, supra*, he said:

"But it was also urged that the party might be subjected twice to punishment for the same offense if liable to be prosecuted under statutes of both State and National legislatures. In regard to this Judge McLean said, in a dissenting opinion, that 'the exercise of such a power by the States would, in effect, be a violation of the Constitution of the United States and of the respective States. They all provide against a second punishment for the same act.' 'It is contrary,' said he, 'to the nature and genius of our government to permit an individual to be twice punished for the same act.'"

It is true that the due process of law to which Mr. Justice Miller here refers is the due process of law guaranteed by the Fifth Amendment, but there, as in the Fourteenth Amendment, its meaning is the law of the land. The two phrases are synonymous, and what Justice Miller has said in regard to their meaning in *Ex parte Lang* applies with equal force in the present case.

Ex parte Ulrich, reported in 42 Fed. 587, holds that the requirement of due process of law as found in the Fourteenth Amendment prevents a State Court from putting an accused twice in jeopardy for the same offense. The facts were that Ulrich, who petitioned the Federal District Court for a writ of habeas corpus, was indicted by the grand jury in Jackson County, Missouri, for the crime of bigamy. After the case had come on for trial and witnesses had been examined on the part of the State, the Court adjourned the case over for several days in order that another suit might be disposed of. The case was further adjourned on account of the alleged indisposition of the judge for more than a month. The trial was then continued, and the prisoner was found guilty and sentenced to two years' imprisonment. The Court decided that the petitioner was undoubtedly placed twice in jeopardy by the proceedings of the State Court. It then considered the question whether this was due process of law within the meaning of the Fourteenth Amendment. The case of *Hurtado v. California*, 110 U. S. 534, was discussed and distinguished from the case in hand. Judge Philips in his opinion said of the *Hurtado* case, on page 593:

"The elaboration of the proposition that the presentment by indictment could not be regarded as the law of the land within the meaning of the Magna Charta, and usage in the common law courts, and for that reason did not come within the meaning of 'due process of law,' extending over 17 or 18 pages of the reported case, leaves no room for doubt that, in the mind of the supreme court, had the right in question been part of the law of the land as hereinbefore defined, the appeal of *Hurtado* would have been well taken under the fourteenth amendment. This conclusion is made irresistible by the dissenting opinion of Mr. Justice Harlan, 4 Sup. Ct. Rep. 292, whose

great effort was to demonstrate the proposition that the necessity of a presentment by grand jury in such an offense, before the accused could be put to trial, was a firmly rooted principle of the common law, and was the law of the land as understood and recognized by the colonists and the framers of the federal constitution. And, to reduce the principles maintained by the majority opinion to the *argumentum ad absurdum*, Mr. Justice Harlan contends that the position taken by them ought to lead to the monstrous conclusion that the term 'due process of law,' as employed in the fourteenth amendment, would not cover the instance of putting a citizen twice in jeopardy for the same offense, which evidently the court would not desire to have imputed to it."

Judge Philips, after this discussion of the *Hurtado* case, to which he had been lead by the contention of the State that it was decisive of the case in hand (*Ex parte Ulrich*), decided that immunity from being twice put in jeopardy for the same offense was guaranteed by the due process of law clause of the Fourteenth Amendment.

We have quoted somewhat at length from the opinion in *Ex parte Ulrich* for the purpose of showing that Judge Philips took for granted that this Court had consciously in mind in the *Hurtado* case the argument against their position, presented by Mr. Justice Harlan, that the decision meant necessarily that the Court would be forced to deny the citizen's immunity from double jeopardy; and also to show that this Court neither intended nor desired such a result.

In the case of *Twining v. New Jersey*, *supra*, it was again urged against the position of the majority by Mr. Justice Harlan that the privilege of immunity from self-incrimination was as much a privilege and immunity within the meaning of the Fourteenth Amendment and also

as fully constituted one of the requirements of due process of law as the immunity from being put twice in jeopardy for the same offense (pp. 124 to 126 of the opinion). While the Court held that the right to immunity from self-incrimination was not protected by the Amendment, Mr. Justice Harlan assumed, and the assumption was not questioned, that the majority of the Court would not have ruled likewise upon the question of double jeopardy.

Both upon principle and upon authority, therefore, we think it is clear that the immunity of the citizen from being put twice in jeopardy for the same offense is protected by that provision of the Fourteenth Amendment which prohibits the States from depriving any person of life, liberty or property without due process of law.

C.

Where for the same offense a person is subject to two punishments which may be inflicted in different proceedings he is put twice in jeopardy, and it is immaterial that one of the proceedings is civil in form.

Coffey v. United States, 116 U. S. 436;
United States v. McKee, Fed. Cas. 15,688;
United States v. Gates, Fed. Cas. 15,191;
United States v. One Distillery, 43 Fed. 846;
United States v. Shapleigh, 54 Fed. 133.

It necessarily follows from the fact that this is a penal action that its form is immaterial in so far as our present objection is concerned. If its object is in fact to inflict a punishment, then in effect it puts the defendants in jeopardy for the offense of trespassing as much as would a criminal prosecution. The cases cited above are all of them instances of proceedings in which it was sought to punish defendants a second time for the same offense. In some

of the cases the accused had already been proceeded against by a civil action to recover a penalty and in some by a criminal prosecution. In each case it was held that the former conviction or acquittal was a bar to the proceeding. It would be difficult to cite a case more exactly in point upon its facts than that of *United States v. McKee*. There the defendant had been indicted, convicted and punished under Section 5440 of the Revised Statutes for conspiring with certain distillers to defraud the United States by the unlawful removal of distilled spirits from their distilleries without the payment of taxes. He was then sued civilly under Section 3296 of the Revised Statutes to recover the penalty of double the amount of the taxes of which the Government had been defrauded by means of the conspiracy. It was held that the latter suit was barred by the judgment in the criminal case.

The McKee case was cited with approval by Mr. Justice Blatchford in *Coffey v. United States*. There it was held that a prior judgment of acquittal in a criminal information by the United States for the same violations of the law alleged in the information by which the present suit for a forfeiture of goods was begun was a bar to the latter suit. The Court, it is true, based its opinion more upon the conclusiveness of the judgment of acquittal as between the same parties than upon the right of the individual not to be twice punished for the same offense; but, nevertheless, as we have said, it quoted with approval the McKee case where, as Mr. Justice Blatchford said: "The decision was put on the ground that the defendant could not be twice punished for the same crime, and that the former conviction and judgment were a bar to the suit for the penalty."

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leigh, refers to it with approval in the passage we are about to quote. The *Shapleigh* case, while it did not decide the exact point for which we contend, is in its reasoning a very strong authority for plaintiffs in error. Judge Sanborn said (on page 134):

"Where provision is made by statute for the punishment of an offense by fine or imprisonment, and also for the recovery of a penalty for the same offense by a civil suit, a trial and judgment of conviction or acquittal in the criminal proceeding is a bar to the civil suit, and a trial and judgment for the plaintiff or defendant in the civil suit is a bar to the criminal proceeding. *Coffey v. U. S.*, *supra*; *U. S. v. McKee*, *supra*."

And referring to the character of the proceeding in that case, which it will be remembered was for the recovery of double damages under the provisions of Section 3490 of the Revised Statutes, for the presentation of a false claim against the Government, Judge Sanborn said:

"The defendant's character and property were in jeopardy, because the government sought to punish him in this suit; and the verdict and judgment here would be a bar to any criminal prosecution for the same offense."

This proposition is also made clear by the cases which hold that exemplary damages are inflicted as a punishment. All these cases hold that such damages cannot be allowed where the same offense is punishable by a fine and imprisonment because to so allow them would put the defendant twice in jeopardy. The leading case is *Fay v. Parker*, 53 N. H. 342, where all the authorities are exhaustively reviewed and considered. Other cases to the same effect are *Austin v. Wilson*, 4 Cush. 273; *Taber v. Hutson*, 5 Ind. 322; *Koerner v. Oberly*, 56 Ind. 284; *Schafer v. Smith*, 63 Ind.

226. It is true the Supreme Court of Minnesota held in *Boetcher v. Staples, supra*, that an action for exemplary damages would lie where the offense was punishable by fine and imprisonment; but it did so because it adopted the theory that such damages are given by way of compensation and not by way of punishment.

The precise question we are here considering, i. e., whether the Legislature can provide two distinct punishments for the same offense, has been decided in the negative in *Koerner v. Oberly*, 56 Ind. 284, and *Schafer v. Smith*, 63 Ind. 226. Indiana, as will be noted, is one of the states where the courts hold that exemplary damages are given by way of punishment; and in the two cases last cited the Court held that the Legislature could not do what the courts could not, viz., give an individual exemplary damage and at the same time provide further punishment by fine and imprisonment.

Certainly the penalty sought to be imposed by the statute of Minnesota here under consideration upon innocent men, by subjecting them to double damages is, under all the authorities, and especially *State v. Buckman, supra*, a "punishment," and it is equally certain that the other penalty imposed on the same class of persons by subjecting them to a fine or imprisonment is another "punishment;" and the statute therefore subjects this class of persons to being twice put in jeopardy for the same offense, and is therefore clearly obnoxious to the clause in the Fourteenth Amendment which forbids any deprivation of liberty or property without due process of law because it subjects plaintiffs in error to double punishment for the same offense.

But the section is also repugnant to the same provision of the Fourteenth Amendment upon general principles, in that it dispenses with the element of intent and makes an inno-

cent and involuntary act a felony and punishes it as such, and also in that it imposes a penalty for the same act which embraces an amount over and above that which could justly be taken from the plaintiffs in error as compensation for the injury that their act has inflicted.

IV.

BOTH THE PROVISION OF SECTION 7 MAKING THE CASUAL AND INVOLUNTARY TRESPASSER LIABLE TO THE STATE IN DOUBLE DAMAGES, AND THAT DECLARING HIS ACT A FELONY, VIOLATE THE PROVISION OF THE FOURTEENTH AMENDMENT THAT NO PERSON SHALL BE DEPRIVED OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW.

A.

The effect of the statute is to eliminate altogether the question of intent.

We have not as yet concerned ourselves to any great extent with the effect of the omission of the element of intent in the statute. In order to determine the full scope of Section 7, we shall consider for a moment some important provisions which occur elsewhere in the act:

Section 7 provides that if any person *without a valid and existing permit* cuts any timber upon State lands or carries the same away he shall be liable to the State. If the trespass was casual and involuntary, double damages only are imposed, although the trespasser is also branded as a felon. We must refer to other provisions of Chapter 163 to determine under what circumstances the bona fide purchaser of State timber may become liable under these drastic provisions of Section 7.

Section 20 of the act provides that in case any sale of State timber is made by fraud or mistake, or contrary to the provisions of the statute, the same shall be void and a permit issued thereon shall be of no effect. It is therefore necessary, in order to determine the validity of a permit in each case, to examine every requirement of this extensive

act, and then, so far as possible, see whether or not the requirements have been fulfilled.

Among the many provisions of the act in regard to the sale of State lands we find it laid down in Section 11 that before any permit shall be granted the timber shall be estimated and appraised and no sale shall be made on any estimate or appraisal more than three years old. And in Sections 12 to 15 various duties are imposed upon the estimators, such as the keeping of records showing the amounts of each kind of timber upon the land examined, the arrangement of land for the purpose of estimates by government subdivisions, and in tracts not larger than 40 acres, the taking of an oath by the estimators and the giving of a bond.

Section 18 establishes the Board of Timber Commissioners, to be composed of the Governor, the Auditor and the Treasurer of the State. It is provided that the Governor shall be the Chairman of the Board and shall preside at all meetings. Before any timber is sold by the Land Commissioner, he must submit to the Board records of estimates and appraisals, and the question of sale is to be determined by the vote of the Governor and one other member of the Commission. If they determine that the sale is necessary, they must endorse upon the record of every estimate of timber to be advertised and sold the statement that such sale is necessary to protect the State from loss. This statement must be signed by them officially and the date affixed; and unless this is done, the section provides that the Land Commissioner shall have no jurisdiction whatever to make the sale.

In Section 21 are found very full provisions for notice of timber sales. The Land Commissioner must give notice of each and every sale by the publication of a prescribed

form in a daily newspaper once in each week for five successive weeks, the first publication to be made at least 56 days before the date of sale; and at least 30 days before the date of the sale a list of lands upon which the timber is situated must be compiled by the Commissioner and published in connection with the notice of sale once a week for three weeks. Copies of these notices and lists must be posted in the office of the County Auditor in each county in which any of the lands described are situated, at least 15 days prior to the sale.

Section 22 provides that there shall be but one timber sale each year, which must be held not later than the 15th day of November.

These are by no means all of the regulations with which the State has hedged about the sale of State timber. The whole act is obviously intended to remove as nearly as may be the possibility of loss to the State in any transaction with respect to its lands. In every instance the burden of risk is thrown upon the purchaser. As for example: A provision in Section 26 that in case the purchaser fails or neglects to cut and remove the timber purchased by him prior to the time when his permit expired, he shall nevertheless pay the State for all the timber which he fails so to cut and remove; but that under no circumstances is he to operate on the land after the expiration of the permit. The act does more than throw a risk upon the purchaser; it makes it impossible for him to determine the invalidity of his permit in many cases, because of the multiplicity of the requirements, as to the fulfillment of which he cannot inform himself. In so far as appears on its face the license which the State has given him may be regular and valid, and yet through a failure of the Land Commissioner to publish the first notice at least 56 days before the time of

sale (to give a fair example) the permit would be so much worthless paper and its holder, should he take timber pursuant to its terms, becomes liable to the State in double damages and is guilty of a felony.

Another example of the extremely drastic operation of the law is the possible case where collusion might exist between the Land Commissioner or other officers representing the State and a purchaser at the sale of any stumpage on State lands. The Land Commissioner is authorized by Section 21 and Section 23 to sell at public auction to the highest bidder stumpage on tracts of pine land not exceeding one section in area where such stumpage does not exceed 100,000 feet in any one section. Assume that the collusion took the form of an improper rejection or manipulation of bids by the commissioner or his representative. Section 20, it will be recalled, provides that if the sale be made through fraud or mistake the permit shall be void. The permit which is issued upon such a sale is therefore worthless. All of the preliminary requirements, so far as the records show, however, are complete. The facts rendering such a permit invalid would be wholly in the knowledge of the State officer and the party purchasing at the sale. Suppose now that the permit obtained by the purchaser is assigned to a bona fide person who had no notice of the fraud and no means of discovering it, and the assignment is properly approved by the State officers, and that the assignee thereafter proceeded to remove the timber from the lands in question under the permit. By the provisions of this law he will be liable to the State in double damages and will be guilty as a felon.

A situation analogous to that which we have supposed actually arose in the case of *State v. Shevlin-Carpenter Company*, 62 Minn. 99. In that case one M. had purchased

the timber at a State sale, and a license or permit regular on its face was issued to him. M. assigned his permit to defendants, and they, without any knowledge of irregularities or omissions in the proceedings prior to the sale and believing the permit to be valid, cut the timber. The statute relating to the proceedings to be taken before a sale could be made, while not so drastic and particular in many of its provisions as Chapter 163, contained many similar provisions. See the opinion of the Court on page 105 of 62 Minn. The plaintiff offered to prove that the timber had never been appraised as required by law, and that the Timber Board had never determined that a sale of the timber was necessary to protect the State from loss (see opinion, p. 104). The Court below rejected this evidence, and directed a verdict for defendant. The Supreme Court said:

"This record presents two questions for our decision: (1) Do the facts which the plaintiff offered to prove render the permit absolutely void? (2) If so, can the permit be assailed collaterally by proof of such facts in this action?"

Then, after reciting some of the then existing statutory provisions, the Court held that these statutory requirements were jurisdictional; that unless they were complied with the Commissioner had no power whatever to make the sale, "and all permits or contracts made on such pretended sales are *void, not simply voidable*." The Court also held that even conceding the permit to be similar to a patent, yet, because the evidence tended to show lack of power in the Commissioner to issue it, it might be collaterally attacked, and was therefore of no protection to the defendants in cutting the timber.

In innumerable instances it is possible for one of the State officers charged with the duty of making the prelim-

inary arrangements for the timber sale either to make an honest mistake, or for some purpose of his own fraudulently to conduct matters so that while the records show nothing amiss, there is in fact a grave defect in the proceedings. The innocent purchaser who, relying upon such fictitious records and his permit, removed timber would be a felon as much as would the man who knowingly defrauded the State. If the Governor's signature, which is necessary to the validity of a permit, were forged by some person for his private profit, the innocent trespasser under this invalid permit is a felon as well as the forger himself.

One other example may be given. A man who is responsible financially makes a contract with a timber owner like the defendants here to cut all the timber belonging to the latter in a certain locality. As a matter of fact, such contracts are being made every year. Among the timber tracts in which the lumberman acquires rights is a section of State timber land. Of course, the contractor knows it is State land, but the timber owner produces a permit valid on its face and reciting (as does the permit in the case at bar—printed record, p. 13) that all the preliminary requirements of the statute have been complied with. The contractor, relying on this permit, cuts the timber, and it is scaled and paid for in full, so that the State actually loses not a cent. But within three years somebody discovers that some jurisdictional pre-requisite to a sale is missing; the contractor can be not only mulcted for double the value of the timber for which he never received a dollar—apart from his profits in the logging operation—but he can also be fined \$1,000 or sent to the State prison for two years.

It is not necessary, however, to go afield for cases illustrative of the severity of the law's operation. The case at bar is a good example of its unfairness. No one could be

more innocent or could have acted in better faith than the plaintiffs in error. They had been informed by the officers of the State that they had a right to proceed under their permit which, on its face, was valid. Therefore they went on with their lumber operations, cut the timber in question and paid the State for it without being at any time warned that their actions were unlawful and that they were committing a felony.

The instances we have given are typical illustrations of the harsh operation of the law upon the innocent purchaser of State timber. We may infer that its injustice and probable unconstitutionality were recognized by the Legislature itself in so far as the felony clause was concerned, for that part of the act was omitted in the general revision of 1905, and we find Section 2442 of the Revised Laws of that year providing that "every such trespass wilfully committed shall be deemed a felony." The equally objectionable feature imposing double damages upon the casual and involuntary trespasser is, however, retained.

B.

This elimination of intent as an element of the offense is contrary to the requirements of "due process of law."

It may well be, though it is a question we are not called upon to discuss, that the State has power to declare a wilful trespasser upon its lands a felon and also to impose upon him a penalty to be recovered in a civil action. But its power to define and punish offenses is not an arbitrary one, and it is the contention of plaintiffs in error that an act which in its essence is innocent, the consequence of which could not have been guarded against and the punishment of which is in no way conducive to the public safety, morals or health, cannot be declared a felony or punished by the imposition

of a penalty. We concede that it is within the power of the State to enact laws creating and defining offenses against its sovereignty, and that in this respect its power is absolute within the limits prescribed by the Constitution of the United States.

Coffey v. Harlan County, 204 U. S. 659.

Our sole inquiry is in regard to the limits so imposed. It cannot be doubted that if the State endeavored to punish as a crime a homicide committed in self-defense it would exceed its constitutional powers as a sovereign and the act would be obnoxious to the due process of law clause of the Fourteenth Amendment. The State cannot take away the right of the individual to defend his life, and therefore it cannot preclude him from making the plea of self-defense. As a general rule it may be laid down that intent has always been an essential element in determining whether acts are punishable as crimes under our law, except where so-called criminal negligence supplies the place of criminal intent or where in a few instances the public welfare has made it necessary to declare an act a crime, irrespective of the actor's intent.

This principle that the Legislature cannot by its mere fiat make an act otherwise innocent a crime and punishable as such is one to which this Court will give effect even though it be not expressly enunciated by the Constitution. The shield with which the Fourteenth Amendment protects the individual is a broad one and sufficient to guard him against an invasion of his individual rights so contrary to the spirit of our institutions.

Mr. Justice Chase, in *Calder v. Bull*, 3 Dall. 386, said that there were certain acts which the Legislature could

not do without exceeding its authority. We quote from his opinion on page 388:

"There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligation of a law in governments established on express compact, and on republican principles, must be determined by the nature of the power on which it is founded. A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action, or, in other words, for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs, the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers; and, therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit of our state governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime; or violate the right of an antecedent lawful private contract; or the right of private property. To maintain that our federal or state legislature possesses such powers, if they had not been expressly restrained, would in my opinion, be a political heresy altogether inadmissible in our free republican governments."

In *Loan Association v. Topeka*, 20 Wall. 655, where it was decided by this Court that a statute which authorized a town to issue its bonds in aid of a manufacturing enterprise of individuals was void because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to other individuals for the gain of the latter, Mr. Justice Miller said, on page 663:

"There are limitations on such power (of the legislature) which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."

The same general doctrine, that there are implied limitations upon the power of the Legislature growing out of the essential nature of our government—which are now embraced in the provisions of the Fourteenth Amendment—is declared by many courts.

Bardwell v. Collins, 44 Minn. 97;
State v. Billings, 55 Minn. 467;
State v. Foley, 30 Minn. 350;
Minnesota Sugar Co. v. Iverson, 91 Minn. 30;
Wilkinson v. Leland, 2 Pet. 627;
Regent v. Williams, 9 Gill. & J. 365;
Powers v. Bergen, 6 N. Y. 358;
Goshen v. Stonington, 4 Conn. 209;
Young v. McKensie, 3 Kelly (Ga.) 31;
Ex parte Martin, 13 Ark. 198;
Henry v. Railway Co., 10 Ia. 540, 543.

In *Regent v. Williams, supra*, after determining that a certain act was in violation of the Federal Constitution, and was therefore void, the Court said (page 408 of opinion):

"But the objection to the validity of the act of 1825 does not rest alone for support upon the construction of the constitution of the United States. Independently of that instrument, and of any express restriction in the constitution of the state, there is a fundamental principle of right and justice, inherent in the nature and spirit of the social compact (in this country at least), the character and genius of our government, the causes from which they sprang, and the purposes for which they were established, that rises above and restrains and sets bounds to the power of legislation, which the legislature cannot pass without exceeding its rightful authority. It is that principle which protects the life, liberty, and property of the citizen from violation in the unjust exercise of legislative power."

In *Henry v. Railway Co., supra*, the Court, discussing the power of eminent domain and the right of the citizen to the free enjoyment of his property, said:

"The plaintiff needed no constitutional declaration to protect him in the use and enjoyment of his property against any claim or demand of the company to appropriate the same to their use or the use of the public. To be thus protected and thus secure in the possession of his property is a right inalienable, a right which a written constitution may recognize or declare, but which existed independently of, and before such recognition, and which no government can destroy."

If it appear that the act in question is not one which the State may properly declare a crime or punish by a penalty, then Section 7 is in effect merely a declaration by the Legislature that so much property now belonging to A. shall in a certain event belong to the State. In other words, it is a confiscation. It is well settled that it is outside the power

of the State to take private property even for a public use without compensation.

In *Davidson v. New Orleans*, 96 U. S. 97, Mr. Justice Miller said, in discussing what constituted due process of law:

"It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."

And in *Chicago, Burlington & Quincy Ry. Co. v. Chicago*, 166 U. S. 226, this Court said, on page 236:

"If, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen."

Other cases where this Court has held that a taking of private property for public use without compensation is a violation of the provision requiring due process of law are:

Searl v. School District, 133 U. S. 553, and
Sweet v. Rechel, 159 U. S. 380.

We emphasize again the fact that this act attempts to do away entirely with the question of intent. It does not merely shift the burden of proof by making evidence of the trespass prima facie evidence of its wilful character. This we may admit for the sake of argument might be proper enough, but here the defendant is absolutely precluded from showing the innocence and good faith of his act. There is no defense of which he may take advantage, and the only

fact in controversy is the State's title to the land from which the timber was taken.

This is as harsh and as contrary to the spirit of our institutions as an *ex post facto* law or a bill of attainder. The victim is equally innocent in either case.

Mr. Justice Field in *Cummins v. State of Missouri*, 4 Wall. 277, where this Court declared unconstitutional those clauses of the Constitution of Missouri which required priests and clergymen, in order that they might continue in the exercise of their professions, to take and subscribe an oath that they had not committed certain acts, among which was participation in the War of the Rebellion, said on page 328:

"The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties."

In the case at bar the plaintiffs in error have not even the privilege of establishing their innocence, for the question of innocence or guilt is immaterial. There is, to be sure, the regular procedure of the trial, but there is in fact nothing at issue. The defendant is permitted no defense. It is well settled that the requirements of due process of law are not satisfied merely by prescribing a form of procedure in court.

In *Chicago, Burlington & Quincy Ry. Co. v. Chicago*, 166 U. S. 226, where this Court was called upon to decide whether certain property of the company which had been

condemned by the City of Chicago for the laying out of a public street had been taken without due process of law, this Court said, on pages 234 to 236:

"Nor is the contention that the railroad company has been deprived of its property without due process of law entirely met by the suggestion that it had due notice of the proceedings for condemnation, appeared in court, and was admitted to make defence. * * * Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. * * * The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation."

A case very similar to the one at bar is that of *Denver & R. G. R. Co. v. Outcalt*, 31 Pac. (Colo.) 177, where the Court held unconstitutional a statute imposing an absolute liability for double damages upon a railroad company for the killing or injuring of any cattle. Such a law, it said, was repugnant to the Fourteenth Amendment of the Constitution of the United States. The language of the Court on page 179 of its opinion seems especially in point:

"The statute is absolute; conclusive of the liability upon proof of the injury and damage only. There is no question of the power of the legislature to repeal laws of evidence, enact new and different laws, or to change or modify existing laws. It is regarded as valid and legitimate legislation, within fixed limits. If the statute made the killing or injury of stock prima facie evidence of mis-management or neglect, and changed the common-law burden of proof, and required the corporation to exonerate itself by competent evidence, the statute could stand; but precluding all defense, and making the liability absolute, it clearly violates a fundamental principle of the constitution, and is repugnant

to the principles and maxims of the common law, upon which the constitution was based. * * * Under the statute in question, as construed and applied in this case, the only participation in the proceedings allowed the defendant corporation is the right to participate in the appraisal of the value or damage."

Another case, which seems in point is that of *Cottrell v. Union Pacific Railroad Co.*, 21 Pac. (Ida.) 416, where the Supreme Court of Idaho held unconstitutional an act fixing absolute liability upon railroads for the killing or injury of cattle, unless the loss occurred through the neglect of the owner. The Court distinguished the statute from those which fixed a penalty for the violation of the duty of fencing. The Court said:

"A penalty—for it is in the nature of a penalty—should not be inflicted upon the defendant by the legislature for doing a lawful act in a lawful manner. * * * The language is plain, and it was clearly the intention of the legislature to make the killing of the animal by the railroad company the only test of its liability. To do this, in our opinion, would be an act of great injustice, and would be a clear violation of the constitution."

We desire also to direct the attention of the Court to the case of *Crescent Liquor Co. v. Platt*, 148 Fed. 894, where the Circuit Court sitting for the Northern District of West Virginia had under consideration an act of West Virginia providing that any common carrier who should deliver to any person a package containing intoxicating liquor, unless such person had a State license to sell the same or was a bona fide consignee who had ordered the same for his own use, should be subject to criminal prosecution. This act the Court held was unconstitutional and void in so far as it applied to interstate shipments because it was an attempt

to regulate interstate commerce, and unconstitutional as to all shipments because it deprived the carrier of property without due process of law. The Court said on page 902 :

"And when said statute endeavors to subject the common carrier and its agents to penalties in connection with the delivery of liquors to persons who may not be bona fide consignees, such carrier and such agents having no knowledge and no opportunity to obtain information of the unlawful intent of the consignee, it is void, because it not only interferes with and attempts to regulate interstate commerce, but it also deprives the carrier and its agents of their liberty and of their property without due process of law, and denies them the equal protection of the laws."

There is a very clear analogy between the carrier who has no opportunity to obtain information of the unlawful intent of the consignee or who cannot, as the Court might have suggested, in all cases be aware of the character of the goods which it is transporting, and these plaintiffs in error who had no opportunity to discover that their acts were in fact a trespass.

We submit that the judgment obtained in this action, in taking from the plaintiffs in error a sum twice as great as the value of the timber which in good faith they obtained from the State, deprives them of property for which they have received no equivalent and which the Legislature cannot take as a penalty since the act for which it is taken is one which is not in its nature punishable. To allow the judgment to stand would in effect allow a confiscation of their property.

V.

THESE PROVISIONS CANNOT BE JUSTIFIED NOR SAVED FROM THE OPERATION OF THE FOURTEENTH AMENDMENT AS A PROPER EXERCISE OF THE POLICE POWER OF THE STATE.

What has been said in the preceding subdivision of this brief we deem conclusive on the point that this act violates the requirements of due process of law, but it was strongly urged by the State in its argument before the Minnesota Supreme Court, and it will undoubtedly be urged here, that the statute may be upheld as a valid exercise of the police power.

A.

The object of the statute was not a proper one for the exercise of the police power.

The first objection that the State's contention has to meet is that this is not a proper case for the exercise of the police power. That power, it is true, may be resorted to as the justification of a great number of legislative acts widely diverse in character. Courts have very liberally construed the State's authority in this aspect of its sovereignty, and have very generally upheld measures which purported to be an exercise of the power of police, wherever it could reasonably be said that they had a tendency to promote the public health, safety or morals.

It has often been held that the Legislature may regulate the conditions of production and distribution of food and forbid its adulteration, and in general it may make such provisions in relation to this matter as is necessary for the health of the community. It may in fact take any reasonable steps for the prevention of disease, may provide hospitals, establish quarantines and require vaccination; it may regulate the water supply, the placing of sewers, the dis-

position of garbage and other filth which might menace the health of the people. Again, in the interest of public health the hours of labor may within reasonable limits be controlled by the Legislature.

The State may further exercise the police power in the interest of public morals. For example: It may prohibit gambling or lotteries, may control or prohibit the keeping of houses of ill fame, the sale of immoral literature, the giving of indecent entertainments, and it may also regulate saloons and theaters and similar places by requiring them to be licensed because of the fact that influences inimical to public morality may be fostered in such places.

Again, the police power may properly be called into service to protect the public peace by the prohibition of unreasonable assemblies in the streets, boisterous behavior and so on.

The Legislature within this power may also make police regulations in the interest of public safety, such as to prescribe a maximum rate of speed for railroads, or automobiles and other vehicles within municipal limits; may require crossing signs, cattle guards, fences and kindred safeguards to be erected by railroads. It may also take measures to prevent fires by establishing fire limits and prescribing reasonable building regulations.

All common carriers, hackmen, warehousemen, hawkers and peddlers, and others whose occupations are more or less affected with a public interest or in the regulation of whose methods of business the public generally is interested, may also be subjected to reasonable police rules by the State.

Many other instances might be enumerated of the valid exercise of the police power, but in every case which can be cited where it has been called into service, we believe that

it was in the interests of the health, morals, safety or comfort of the public generally and in no case merely to protect the property rights of an individual as such. If protection was given to private property and the rights of the individual were safeguarded by the legislation in question, such protection was merely incidental, as in the case of *Missouri Pacific Ry. Co. v. Humes*, *infra*; and the object of the legislation was to protect the public.

However, the State is not in this case acting for the purpose of protecting the public health, morals or safety, but solely for the purpose of protecting its proprietary rights, as we have already urged in another connection. As the Supreme Court of Minnesota said, the State is interested in the protection of its property to as great an extent as a private owner would be, and may avail itself of the same means of protection. But we venture to suggest that it can avail itself of no larger relief than it can give to the individual citizen. Yet the State in this action is doing for itself, and to protect its own property, what it could not do to redress the private grievance of its citizens. It is attempting to punish by its sovereign power what is solely an injury to its property as though it were a public offense.

In *Colon v. Lisk*, 153 N. Y. 188, the Court of Appeals of the State of New York had to decide the constitutionality of a statute which provided for the summary seizure of any boat or vessel used by one person in interfering with oysters or other shell fish belonging to another person, and for its forfeiture and sale, and for the payment of the avails to the Commissioner of Fisheries. The Court had no difficulty in deciding that the statute violated the provisions of the Fourteenth Amendment in regard to due process of law and that it was not within the police power

of the State since it involved the confiscation of private property for the mere protection of private rights. We quote from the opinion of the Court on page 197:

"It is to be observed that the statute does not relate to the health, morals, safety or welfare of the public, but only to the private interests of a particular class of individuals. Nor can it be fairly said that the means provided for the protection of those interests are reasonably necessary to accomplish that purpose. But, on the contrary, they are plainly oppressive and amount to an unauthorized confiscation of private property for the mere protection of private rights. It is in no manner attempted by this statute to protect any public interest, or defend any public right. Nor is it calculated to accomplish that end, but, under the guise of a pretended police regulation, it arbitrarily invades personal rights and private property."

It seems clear that the *Colon* case is good law and that one test which may be applied in determining whether or not a particular law is a valid exercise of the police power of the State is whether the purpose is to protect the safety, health, morals or general good of the public, or merely to redress a private grievance. *Colon v. Lisk* is no less applicable to the present situation because in our case the State of Minnesota is the property owner whose rights have been invaded. The State as a property owner acts in a different capacity from that which it occupies as a sovereign. As the Supreme Court of Minnesota said in the case at bar:

"In matters involving its proprietary or business functions the State occupies the same position as a private suitor."

It is true that the State holds its timber lands for the ultimate benefit of the people. The proceeds from the sale of timber or of the land itself go into the School Fund

and are used in the support of the public educational system; but the fact that these avails of the land are employed in carrying on a proper function of government does not signify that the State in its ownership and management of the land is acting as a sovereign. If the State should engage in farming operations upon the land which it owns in order to increase its revenue by the profits which it might obtain, and should use the income from this source for governmental needs, the fact that the proceeds were used for that purpose would not in any way affect the nature of the State's agricultural operations. These would still remain operations characteristic of a private individual and unconnected with the State's governmental functions. The end to which the proceeds of a transaction are devoted cannot, in other words, determine its nature.

B.

The cases relied upon by the Minnesota Supreme Court to support the theory that Section 7 is a valid exercise of the police power are not in point.

The Supreme Court of Minnesota adopted the State's contention that the police power justified the passage of Section 7, and relied upon a number of cases in support of this theory, which, we believe, can in every instance be distinguished from the case at bar. It may perhaps be well to examine these authorities and see how far they are in point.

A case very strongly relied upon by the State is that of *Missouri Pacific Ry. Co. v. Humes*, 115 U. S. 512. It was cited by the Court to support the statement that legislative provision for double or treble damages in the case of a wilful trespass was proper. It is difficult to see what bearing this proposition has upon the case at bar. Its mere state-

ment sufficiently distinguishes it from the circumstances before us for consideration. In the Humes case this Court determined the constitutionality of a statute of Missouri requiring railway corporations to erect fences, cattleguards, etc., along their right of way, and providing that until they were made and maintained the corporation should be liable in double the amount of all damages which should be done to live stock on its road occasioned by the failure to construct or maintain such fences. In a suit by an adjoining property owner for double damages under the statute the railroad company objected that the law was unconstitutional for the reason that it deprived the defendant of its property without due process of law, in so far as the amount of recovery exceeded the value of the property injured. The validity of the statute was upheld in this Court. Mr. Justice Field, who delivered the opinion of the Court, said on page 521:

“For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. * * * The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the State receives them. That is a matter on which the company has nothing to say. And there can be no rational ground for contending that the statute deprives it of property without due process of law. The statute only fixes the amount of the penalty in damages proportionate to the injury inflicted.”

Throughout his discussion he lays emphasis upon the fact that the damages, or more properly speaking, the penalty is imposed as a punishment for a violation of a duty imposed by statute. The Court said that the law of Missouri in question, in requiring railroads to erect fences imposed a duty

"in the performance of which the public is largely interested. Authority for exacting it is found in the general police power of the State to provide against accidents to life and property."

Here the Court consciously makes the very distinction which we have heretofore urged, viz.: that the police power must be exercised in behalf of the public and not in behalf of an individual and his private rights. In the Humes case the duty which the railroad company violated and for the violation of which the penalty of double damages was imposed was a duty in the discharge of which the public was interested. It was such a neglect, the Court further said, that might be considered a case of gross negligence; "for any neglect of duties imposed for the protection of life or property is culpable and deserves punishment."

It is nowhere in the opinion intimated that additional damages might properly be imposed where there was no element of malice or negligence and no intent to do a wrongful act; and on the contrary, the tenor of the Court's reasoning impels us to the conclusion that a statute imposing such damages, where the act was an innocent one violative of no duty, would have been condemned.

To show further in what light this court has always regarded the decision in the Humes case and to show that it in no way supports the decision of the Minnesota Supreme Court in the case at bar, we call the court's attention to the cases of *Minnesota Railway Co. v. Beckwith*, 129 U. S. 26, and *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150. The Beckwith case involved the validity of a provision in the Code of Iowa which authorized the recovery of double the value of stock killed, or of double damages where the stock was injured by a railroad when the injury took place at a point on its road where it had a right to erect a fence

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and failed to do so. This court held that such a provision was not in conflict with the Fourteenth Amendment as depriving the company of property without due process of law. It was urged that no duty was imposed upon the railroad company to fence its lands, that this was not a penalty for the violation of any such duty and could not therefore be justified. The court acceded to the position of counsel, that if no duty had been violated no penalty could have been imposed, but it said that the omission of such fencing might well be regarded as evidence of such a culpable negligence as to justify punitive damages.

In the Ellis case this court held unconstitutional an act of the state of Texas which required railroad companies to pay in certain cases attorney's fees to the party successfully suing them while it gave to them no corresponding benefit. The court distinguished the case from that of *Missouri Pacific R. Co. v. Humes*, and Mr. Justice Brewer, referring to the latter case, said on page 158:

"But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the State, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the State and with a view to enforce just and reasonable police regulations.

"While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the State has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for non-performance."

This language is especially pertinent to our situation. Here there is no duty imposed and therefore we submit that there can be no penalty for its non-performance. Here there is no police regulation to enforce as in the Humes case. Our situation is, on the other hand, analogous to that in the Ellis case, or in the case of *Denver & R. G. R. Co. v. Outcalt* before referred to; where no duty was imposed upon the defendants, and the liability was absolute irrespective of negligence.

In the one case which has come before this court where it was held that an absolute liability imposed for damages, irrespective of the negligence of the defendant was constitutional, this court distinctly went upon the ground that the damages given were compensatory and not penal in any sense. The case we refer to is that of *St. Louis, etc., R. Co. v. Matthews*, 165 U. S. 1, where this court upheld a statute of Missouri providing that railroad companies should be responsible to the owner of property injured or destroyed by fire communicated directly or indirectly by locomotive engines, the railroad company being however authorized to procure insurance on the property adjoining its right of way. The Court, at page 26 of its opinion, in upholding the validity of the statute, called attention to the fact that:

"The very statute, now in question, which makes the railroad company liable in damages for property so destroyed, gives it, for its protection against such damages, an insurable interest in the property in danger of destruction, and the right to obtain insurance thereon in its own behalf. * * * The statute is not a penal one, imposing punishment for a violation of law; but it is purely remedial, making the party, doing a lawful act for its own profit, liable in damages to the innocent party injured thereby, and giving to that party the whole damages, measured by the injury suffered."

The case at bar would have been a similar one if but single damages had been sought by the State. There is no disposition on the part of the plaintiffs in error to contend that they should not be liable for the damages actually inflicted. Their only contention is that it is not a case where a penalty can properly be imposed.

The other class of cases cited by the Minnesota court, and very much relied upon to support the theory that the act which we have under consideration is a valid exercise of the police power, are those holding that statutes imposing absolute liability for the sale of liquor to minors, for keeping saloons open on Sunday, for the sale of adulterated milk, and similar laws may properly make a criminal intent unnecessary as an element of the offense. The plaintiffs in error do not question the soundness of these decisions but they dispute their applicability to the case in hand. An examination of the cases referred to which the court will find cited in the opinion in 99 Minnesota at page 165, will disclose that in every instance there was a bona fide action on the part of the legislature to safeguard the public health, morals or safety, or to protect the public against frauds.

Commonwealth v. Wentworth, 118 Mass. 441, there cited, held it within the power of the Legislature to impose a penalty upon any one selling naphtha under an assumed name, irrespective of his knowledge; *Regina v. Woodrow*, 15 Mees. & W. 404, decided that in order to inflict punishment for keeping adulterated tobacco, it was not necessary to show that the accused had knowledge of the adulteration; *State vs. Kelly*, 54 Ohio St. 766, was a prosecution under an adulterated food act; *People v. Roby*, 52 Mich. 577, and *People v. Waldvogel*, 49 Mich. 337, were prosecutions under a Sunday closing act. A reference to these few cases is enough to indicate that all the authorities cited by the Min-

nesota Supreme Court, of which these are fair examples, may be referred to one or another of the classes which we have heretofore enumerated as embracing all instances of proper exercise of the police power. These may all be upheld as examples of protection by the State of the public health, morals or safety.

C.

Assuming that the object of the statute was one which might properly be effectuated by an exercise of the police power, nevertheless this statute cannot be upheld as a reasonable or appropriate exercise of the power.

If it were conceded that the protection of its property rights in land is a proper object for the exercise of the State's police power, it is manifest that the Legislature has not properly exercised that power, and that the act as it stands has no tendency to accomplish that object. It is well settled that the State's power of police is not absolute; the Legislature cannot under its guise enact an absurd and unreasonable law which has no relation to the public health, safety or morals.

Mugler v. Kansas, 123 U. S. 623, 669.

In the very recent case of *Welch v. Swasey*, 214 U. S. 91, this court upheld the constitutionality of a statute of Massachusetts limiting the height of buildings in Boston, on the ground that it was a valid exercise of the police power of the State. Mr. Justice Peckham speaking for the court, said at page 105 of the opinion:

"The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish, or aid in the accomplishment of some purpose, for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These

principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case; the courts will declare their invalidity. The following are a few of the many cases upon this subject: *Mugler v. Kansas*, 123 U. S. 623, 661; *Minnesota v. Barber*, 136 U. S. 313, 320; *Jacobson v. Massachusetts*, 197 U. S. 11, 28; *Lochner v. New York*, 198 U. S. 45, 57; *Chicago Railway Company v. Drainage Commissioners*, 200 U. S. 561, 593."

And again in *Lawton v. Steele*, 152 U. S. 133, this court said at page 137:

"The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

If it were admitted that it is proper for the State to exercise its police power to protect the property which it holds not for government purposes, but in its proprietary capacity pure and simple, yet we insist that the exercise of the power in this instance was most unreasonable and unadapted to the end sought, which was obviously the protection of the State's lands from trespassers. The effect of the present act is not to put prospective purchasers of State land upon their guard and to cause them to examine their title carefully. It will cause no precautions to be taken which are now neglected, for the greatest precaution on the part of the purchaser will not satisfy the statute nor save the possible trespasser from danger of punishment. On the other hand its effect is greatly to lessen the market for State timber, for he who pur-

chases assumes a risk against which he cannot insure himself by any care and diligence of his own, of being heavily penalized by the State for an act which he supposed legal and which he could not have discovered to be otherwise. The only way to insure safety from persecution under this act is to abstain from cutting State timber under any circumstances.

If the object of the statute was to protect State lands from depredations of wilful trespassers and to prevent the careless person from overstepping by mistake the boundaries of his own property and encroaching upon the State's preserves, a reasonable and proper manner of effecting this object would have been by the creation of a presumption of wilfulness, leaving it to the trespasser to rebut this by showing his good faith. The statute might with reason go even further and declare an honest mistake as to boundary should be no defense, for it is fair to place upon a man the burden of ascertaining the limits of his own land; but absolutely to preclude every defense and to make the trespasser ipso facto a criminal and subject to this penalty is to enact not a law but an arbitrary and capricious fiat, which is irreconcilable with the conception of due process of law.

An instance of a law which throws upon the defendant the burden of introducing evidence to rebut a presumption of wilfulness, is found in the statutes of Minnesota relating to cases of trespass upon the property of private persons. The act to which we refer is embraced in the Revised Laws of 1905 as Section 4268. It exacts treble damages from any one who unlawfully carries away the personal property of another. But it provides further that "if he shall show upon the trial that he had probable cause to believe that such property was his own, or was owned by the person for whom he acted, judgment shall be given for the

actual damage only, and for costs." The same rule of evidence is adopted in the case of trespass upon real property by Section 4449 of the Revised Laws of 1905, which gives treble damages for the cutting down or injury to trees on the property of another, "unless upon the trial it appears that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which the trespass was committed was his own or that of the person in whose service or by whose direction the act was done, in which case judgment shall be given for only the single damages assessed."

These two sections embody the sort of provision which we suggest might have been enacted by the State to prevent trespasses upon its timber land and which, it may be, would have been a proper exercise of the sovereign power. A statute such as these would have accomplished every object that the Legislature had in mind, and in fact would have been more nicely calculated to do so than the one whose constitutionality we have under consideration. It is difficult to understand for what reason the Legislature adopted, with reference to State lands, a more drastic law than in the case of trespass upon the property of the private citizen. The property rights of the citizen are as well protected by the provisions of these sections of the Revised Laws raising a presumption of wilfulness in the case of trespass, as are the proprietary interests of the State by the more stringent and unreasonable provisions of section seven. The distinction which the Legislature has made in these respective enactments seems without foundation in reason or in justice.

A case which seems in its reasoning very applicable to our situation is that of *Adams v. New York*, 192 U. S. 585, where this court held among other things that the provisions of sections 344A and 344B of the Penal Code of New

York making the possession of policy slips by a person other than a public officer a presumption of possession knowingly in violation of law were not contrary to the Fourteenth Amendment. It was urged that the raising of this presumption from the mere fact of possession was a violation of the due process of law clause of the Constitution, but the Court said on page 599:

"The policy slips are property of an unusual character and not likely, particularly in large quantities, to be found in the possession of innocent parties. Like other gambling paraphernalia, their possession indicates their use or intended use, and may well raise some inference against their possessor in the absence of explanation. Such is the effect of this statute. Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only prima facie evidence, and the party is permitted to produce such testimony as will show the truth concerning the possession of such slips."

It is to be inferred from this language that the court would have decided otherwise if the presumption from the possession of the policy slips had been conclusive and the party accused under the statute had been given no opportunity of defense; and if the facts had been such in the *Adams* case it would have been perfectly analogous to the case at bar.

In this connection we wish to direct the Court's attention to the cases of *Denver & Rio Grande R. Co. v. Outcalt*, 31 Pac. (Colo.) 177, and *Cottrel v. Union Pacific Railway Co.*, 21 Pac. (Idaho) 416, to which we have already referred. In both these cases statutes were held unconstitutional which arbitrarily imposed penalties upon acts innocent in themselves and which precluded all defense. In the *Outcalt* case the Court expressly said that if the statute

under consideration, which absolutely imposed double damages upon railroads for all cattle killed or injured, had made such killing or injury prima facie evidence of the company's fault, it would have been valid and the court's decision would have been otherwise.

The plaintiffs in error contend therefore that the provisions of Section 7 can in no way be supported as an exercise of the police power of the State: First, because the object which it is sought to accomplish by the statute is not a proper one for which to employ that power; and, secondly, because in any event Section 7 is not a reasonable or appropriate means of attaining the end sought by the Legislature.

WHEREFORE, These plaintiffs in error respectfully pray that the judgment of the State Court be reversed.

Respectfully submitted:

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FILED.

JAN 24 1910

JAMES H. MCKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1909.

No. 139.

SHELVIN-CARPENTER COMPANY and JOHN F. IRWIN,
Plaintiffs in Error,

vs.

STATE OF MINNESOTA,
Defendant in Error.

BRIEF OF THE DEFENDANT IN ERROR.

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Defendant in Error.

STATEMENT.

The State of Minnesota owns large tracts of land granted to it by the Government of the United States for school purposes, many of which, in the northern part of the state, are covered with a heavy growth of valuable pine timber.

Prior to 1895 a large part of said timber had been stolen from these lands, and in order to guard against a continuance of this practice, the legislature, that year, enacted Chapter 163 of the Laws of 1895, which covered the whole subject of the dis-

position of these lands, and the timber thereon; and provided drastic penalties for wrongfully taking such timber. Under a prior law it was provided that the state auditor should be ex-officio Land Commissioner. The scheme of the said act of 1895 can be briefly summarized as follows:

1. Timber on State school land is to be sold only when liable to waste by fire or otherwise.

2. A board of timber commissioners is created consisting of the governor, auditor and treasurer; no pine timber can be sold by the land commissioner until it is decided by this board that it is subject to waste.

3. If such timber board decides that any individual tract is liable to waste it may, after appraisal, be sold by the land commissioner, at public auction, after notice, and at a price not less than the appraisal.

4. The purchaser of the timber must make a *deposit* at the time of the sale of a small part of the purchase price and pay the balance of such price after the timber is cut and scaled. He is given a *permit* to enter upon the land and cut the timber at any time during the *two* succeeding logging seasons; at the expiration of which time the *permit* becomes *void*; but for cause, and by unanimous consent of the timber board, the *permit* may be extended for *one* year, only; for the law, further provides that under no circumstances shall the permit be extended for more than the *one* year.

5. Anyone who cuts or removes timber from State land *without a valid permit* shall be guilty of a felony, and shall also be liable in a civil action for treble damages, if the trespass is willful—but for double damages, only, if the trespass be “*casual or involuntary.*” Appendix “A” hereof.

The Court will note that this law is limited by its terms to lands owned by the State and timber thereon, and that its provisions do not apply to property owned privately, or to dealings of citizens between themselves. And further that it applies to a subject that is exclusively *domestic*, and that it does not touch upon any subject of *federal* cognizance.

It appears from the pleadings in this case that the plaintiff in error (defendant below), a lumber company, purchased, at a public sale of state timber held on November 15, 1900, a large quantity of timber then standing on State land, and paid on such sale the statutory *deposit*; that it thereupon received a *permit*, issued at its request in the name of its agent, Irwin, permitting entry upon the land to cut and remove this timber; that this permit by its terms expired June 1, 1902; that the timber was not cut within the time so limited, and that upon application of the company the state timber board, as it was authorized to do, extended the life of the permit for the *one* year, or until June 1, 1903, on which latter date the permit *absolutely expired*.

After the permit had expired, and in the logging season of 1904 the plaintiff in error, cut and re-

moved the timber and converted it to its own use. Thereupon, without any warrant of law therefor, it caused such timber to be scaled, and it paid to the state treasurer, and that official received, a sum of money equal to the value thereof at the price mentioned in the *expired* permit.

But as the cutting of the timber was done *without a valid permit* it was under the statute a *trespass* for which the defendant was liable in treble damages, if the act was *willful*, and double damages if the act was *casual or involuntary*. The payment, therefore, made to the state treasury was in, either event, insufficient to satisfy or discharge the amount due from the plaintiff in error to the State; because, assuming the law to be valid, immediately upon the commission of the trespass the plaintiff in error became liable to the State for treble *or at least double* the stumpage value of the timber taken.

No criminal prosecution was ever instituted by the State within the statutory period of limitation, and the crime, if one was committed, is now outlawed.

Upon the attention of the law officer of the State being called to the matter, a suit was commenced, in the name of the State, against the trespasser for treble damages, it being alleged that the trespass was willful. The cutting, and the amount, of the timber taken were admitted, but the defendant claimed it had acted in good faith in the premises, because, in a conversation with the state auditor (state land commissioner) after the permit by law

had expired, absolutely, it was given to understand that the same would be extended for an additional year. It also claimed that the law in controversy was unconstitutional and void for the reasons, so far as here material, which are stated in its answer. (Printed Transcript, folio 4, page 10.)

At the trial in the district court the State agreed that the value of the timber when cut might be assessed as \$6 per thousand feet, instead of \$7 per thousand feet, the price named in the permit, and thereupon the defendant offered its evidence, which appears at pages 19-29 of the printed transcript.

The state auditor was sworn on behalf of the defendant, and he testified on cross-examination that he distinctly told the agent of the plaintiff in error that when a second extension of permit was asked, it could not again be extended under the law. (P. T. f. 30, p. 26.)

The attention of the Court is respectfully called to the further fact that the permit itself refers to the section of the law under which such permit may be extended beyond its original terms; and that under the section so referred to ~~it~~, it is expressly provided that there shall be no second extension, and that under no circumstances shall the permit be extended for more than the one year therein mentioned.

The plaintiff in error demurred to the complaint. The demurrer was overruled by the trial court and on appeal to the supreme court of the State the rule of the trial court was sustained. Further mention

of this will be made hereafter, but for the present attention is called to the opinion of the supreme court of the State upon that appeal, the same being hereto annexed at appendix "B" hereof.

On the remittitur from the supreme court of the State, the plaintiff in error answered, the matter was tried on the merits, and the trial court thereupon gave the State judgment for treble damages, holding the trespass to have been willful (P. T. f. 48, p. 36), allowing the plaintiff in error, however, credit for the amount paid to the State Treasurer hereinbefore mentioned. On appeal, however, from that judgment being the second appeal to the State Supreme Court the court of the State modified the the judgment below, holding by a divided court, that the trespass was not willful within the meaning of the statute on account of the alleged "good faith" of the defendant, and thereupon reduced the recovery of the State to double damages, that being the minimum recovery under the statute. Such court further allowed the defendant, plaintiff in error here, as a credit on its liability to the State, as did the trial court, the amount plaintiff in error had voluntarily paid into the state treasury after the trespass was committed. Further reference will be made to this latter opinion of the supreme court of the State, the same being the opinion upon which the judgment at bar was entered, but for the present, suffice is to say that this latter opinion appears at appendix "C" hereof.

On the first appeal, State v. Shelvin-Carpenter

Co., 99 Minn. 158, appendix "B" hereof, when the case was at issue on defendants (plaintiff in error) *demurrer* the court construed the terms of the act, and held it to be constitutional. On the second appeal when the case was before the court on the issues raised by the *answer* it applied the law, so construed, to the facts as they appeared from the testimony and the findings of the trial court. 102 Minn. 470, appendix "C" hereof.

On the first appeal the court held that under the terms of Section 7 of the act, every trespass, whether willful or not was a felony, and that each trespasser could be punished criminally, and also be held liable for exemplary damages in a civil action.

POINTS AND AUTHORITIES.

The matter is not before this court for review.
State's Brief, pp. 9-13.

The construction placed upon the act at bar by the Minnesota court controls, as to whether, as so construed, the act is in conflict with the Constitution of the United States.

State v. Shevlin-Carpenter Co., 99 Minn. 158.
State v. Shevlin-Carpenter Co., 102 Minn. 470.
C. M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 456.

Gate wood v. North Carolina, 203 U. S. 531.

Oakes v. Mase, 165 U. S. 363.

Leffingwell v. Warren, 2 Black. 599.

The court will consider only the federal questions presented to, and passed on, by the State Supreme court.

Waters-Pierce Oil Co. v. Texas, No. 2; 212 U. S. 112-115.

Harding v. Illinois, 196 U. S. 78.

Criminal liability under the statute is not here for review. Plaintiff in error is not under arrest, is not in that "class," and double jeopardy under the federal constitution was never presented to the State court.

Seaboard Air Line v. Seegard, et al., 207 U. S. 73.

Hatch v. Reardon, 204 U. S. 152.

Lee v. New Jersey, 207 U. S. 67.

Plaintiff in error never complained that the statute was not *enforced* in accordance with "those general rules which our system of jurisprudence prescribes." Therefore, inquiry may only be directed as to whether the act is "within the legitimate sphere of legislative power."

Missouri Pacific Ry. Co. v. Humes, 115 U. S. 512-519.

The act has to do with the *unlawful* taking of the property of the State held by it in its proprietary capacity. It is therefore within the general scope of legislative power.

The circumstances justify the enactment of the act in question.

State's Brief, pp. 1-7 and 24-25.

Under like circumstances between individuals the legislature has the power to provide for, *Double damages.*

Boetcher v. Staples, 27 Minn. 308.

Brown v. Evans, 8 Sawy. 488; 17 Fed. 912.

Smith v. Bagwell, 19 Fla. 117; 45 Am. 12.

Hendrickson v. Kingsbury, 21 Ia. 379.

Brown v. Swineford, 44 Wis. 282; 28 Am. 582.

Mayer v. Frobe, 40 W. Va. 246;

and where the State is a party to *eliminate* the question of evil intent.

Clark & Marshall's Law of Crimes, p. 103.

Commonwealth v. Murphy, 165 Mass. 66; 30

L. R. A. 734.

Commonwealth v. Wentworth, 18 Mass. 441.

Regina v. Woodrow, 15 Mees. & W. 404.

Halstad v. State, 41 N. J. Law, 552.

Commonwealth v. Connolly, 163 Mass. 539.

State v. Keley, 54 Oh. St. 166.

State v. Smith, 10 R. I. 258.

State v. Huff, 89 Me. 521.

State v. Zichfeld, 23 Nev. 304.

People v. Waldvogel, 49 Mich. 337.

People v. Robe, 52 Mich. 577.

State v. Presnell, 34 N. C. 103.

State v. Quackenbush, 98 Minn. 515.

Trompen v. Verhage, 54 Mich. 304.

Newton v. Gordon, 52 Mich. 642.

Kerr v. O'Connor, 63 Penn. St. 341.

Chickering v. Lord, 67 N. H. 555.

State v. Hartfield, 24 Wis. 60.

U. S. v. Leathers, 6 Sawy. 27.

People v. Christain, 144 Mich. 247; 107 N. W. 919.

State v. Dorman, 9 S. D. 528.

The State, in the protection of property, held by it, in its proprietary capacity, is entitled to like protection.

ARGUMENT.

THE LIMITS OF THE INQUIRY BY THIS COURT.

While the State is of the opinion that the supreme court of the State erred on the side of leniency in its judgment in this case, the State concedes that, for the purpose of this hearing, the construction of the law by the State supreme court must be taken as correct. Therefore, on the question of the constitutionality of the law this court will only inquire whether the law, *as so construed*, is in conflict with the federal constitution, and will not re-examine the question as to whether or not the construction placed upon it by the State court is correct.

“The construction put upon the statute by the supreme court of Minnesota must be accepted by this court for the purposes of the present case as conclusive, and not to be re-examined here as to its propriety or accuracy.
* * *”

C. M. & St. P. Ry. Co. v. State of Minnesota,
134 U. S. 456.

In other words, such being the construction of the statute, this court is bound thereby, unless, *as so construed*, the act conflicts with the constitution of the United States.

The question, therefore, before this court then, if any, is not whether the Minnesota court was right in its view of the law, but whether the act as so construed by the Minnesota court violates the federal constitution in the manner in which the plaintiff in error complains.

As to the provision of the statute providing that the stealing of State timber shall constitute a felony, the State believes, and will hereafter demonstrate, that the same is not here for review. But for the present purpose it is conceded that the statute under consideration makes the "*casual and involuntary*"—the unintentional—taking of State timber, as well as the *willful* taking thereof, a felony, and in addition thereto imposes a penalty in the shape of *double* damages on a "*casual or involuntary*" trespasser, and *treble* damages on a *willful* trespasser, and that such penalties may be recovered in a civil action. Such being the situation the question here presented is whether these features of the law violate those provisions of the federal constitution of which plaintiff in error complains.

Before proceeding, however, to a discussion of this one question which, if any, is presented for the consideration of this court, the State desires to call attention to—

THE LACK OF JURISDICTION IN THIS COURT TO
HEAR AND CONSIDER THIS WRIT OF ERROR.

This writ of error is sued out under Section 709 of the Revised Statutes of the United States, which allows the review by this court of a decision of the highest court of a state, where there is drawn in question the validity of a statute of the state on the ground of its repugnancy to the constitution of the United States, where such decision is against the right set up, or claim under said constitution.

The writ of error in this case was not passed upon by this court or a justice thereof, but was allowed by the chief justice of the supreme court of the state.

It is well settled in this court that before a decision of a State supreme court will be reviewed on writ of error it must be made to appear that there is color of merit in the federal question sought to be raised; that the same was squarely presented to the state court, and necessarily considered by it in the decision of the question presented for its determination.

Further, it must appear that the question was either raised by the pleadings, and urged as a ground of decision, or at least, that it was squarely raised and presented to the State court by proper assignments of error, therein, and the pleadings and assignments of error by which it was raised, must, under the rule, be incorporated in the record.

Waters, *Pierce Oil Co. v. Texas* (No. 2), 212 U. S. 112-115.

Harding v. Illinois, 196 U. S. 78.

In this connection the State desires to respectfully call the attention of the court to the absence in the record here of the assignments of error in the State court, and urged upon that court. This failure or omission may not of itself be determinative of the question here presented, under the rule announced in *Columbia v. Columbia*, 172 U. S. 475, for the pleadings do attempt at least to suggest a federal question (P. T. f. 4, p. 10), and the State desires to make no particular point of the

omission in and of itself. But the State does desire to call to the attention of the Court, that, in this case, the decision of the State court on the constitutionality of the law involved was rendered on the first appeal thereof, when the issue was raised by *demurrer*, and by assignments of error on the appeal from the trial court where the *demurrer* was overruled; that on that record the State supreme court rendered its decision and held the law constitutional; that no part of that appeal is presented by the record in this case, except by the reference thereto in the second opinion, appendix "C" hereof; that the defendant acquiesced therein, then *answered* in the action, and went to trial on the merits; that on the second appeal to the State supreme court from the decision in favor of the State, on the merits, the case came before the State supreme court in a different form. The issues were then on *complaint and answer*, the court simply remarking that it adhered to its former decision:

"On a former appeal upon demurrer to the complaint, *State v. Shevlin-Carpenter Company*, 99 Minn. 158, the constitutional questions were raised, and it was there held that the act was constitutional, and that in case of trespass the State might recover either the double value of the property taken, or treble its value, according to whether the facts constituted a casual or involuntary, or a willful and unlawful trespass. We adhere to that decision and for the reasons set forth in the opinion then filed."

(P. T. f. 58, p. 42.)

And then giving consideration to the questions which were in reality then before it for determination, said:

"There are two questions before the Court:

1. Did appellant make out its defense that the timber was lawfully cut and removed and was paid for in full

2. If the evidence fails to sustain that position and warrants the conclusion that the timber was cut and removed without authority of law, then was it taken under such circumstances as to warrant the State in recovering as for a willful and unlawful trespass, or was the act of cutting and removing the timber of such a character as to bring it within the provisions of the statute, viz: a casual or involuntary trespass?"

That in other words, on the second decision by the State supreme court, the one involved here, the only question considered was as to whether the defendant was a *willful*, or a *casual and involuntary* trespasser. The court gave the defendant the most favorable decision it could get under the rule of recovery laid down on the first appeal, *but did not give the alleged federal question any consideration whatever*. Therefore the State suggests, that it is necessary in order that the decision of the State supreme court on the constitutionality of the law, the first appeal, may be fairly reviewed here, for this court to have before it, as a part of the record, the pleadings and assignments of error as they were presented to the State supreme court on the *first* appeal; because the real question before this court is not whether the State supreme court erred in its *second* de-

cision, but whether it erred in its *first* decision in this case, where it held that this law was not repugnant to either the state or federal constitution. The matter could have been brought here for review by a writ of error prosecuted from the judgment entered on the first appeal. No such action was taken and the former opinion of the State court is not here, at least in the record, and since this record wholly fails to present to this court the real issues as they were raised and presented to the court below, it follows that this court is without jurisdiction of this writ of error.

The State earnestly calls to the attention of the court the anomaly thus presented by the record. It is an attempt to present a federal question to this court by an *answer*, which federal question, if any, was determined by the State supreme court on a *demurrer* to the complaint and prior to the serving of such answer.

The State respectfully suggests that courtesy to the State supreme court and the rule alike, demand that the reasons which induced the State supreme court to hold the act constitutional should be presented to this court, by the record, for its consideration, and that in the record at bar there is an utter lack and want thereof.

Waters Pierce Oil Co. v. Texas, *supra*.

Harding v. Illinois, *supra*.

However, assuming that the court has jurisdiction and that a federal question is brought here by the record, the criminal features of Chapter 163, Laws of Minnesota 1895, will not be considered by this court.

Criminal liability under the statute is not here for review.

On writ of error to a State court this court will review a State law, only so far, as to ascertain whether the statute as enforced, in the case before the court, deprives the plaintiff in error of any rights secured to him by the federal constitution. A large part of the brief of the plaintiff in error is devoted to the argument that this law by its terms *could* be so enforced as to make it very drastic. It complains because the individual who, by an honest mistake, might get over the line of his own land on to a tract owned by the State and cut a single tree, would be guilty of a felony. But it is to be remembered that no *criminal prosecution* was ever instituted by the State on account of the acts complained of, herein, against the plaintiff in error; and that at the present time the *statute of limitations* has run against the institution of any such criminal action. Therefore, it does not lie in the mouth of the plaintiff in error to suggest that such an action might have been commenced against it, and that therefore that the act in question as plaintiff in error complains, is unconstitutional.

In its brief before this court, plaintiff in error seems to claim that the Minnesota law is repugnant to the federal constitution for two reasons: First, because it makes the act of an involuntary trespasser a crime, and second, because it subject both intentional and unintentional trespassers to two penalties; one, a criminal penalty, and the other

a civil penalty, in the shape of exemplary damages; yet, it is clear, that, by reason of the fact that no criminal action has been started and now can never be started against plaintiff in error, the criminal feature complained of does not apply to the *class* to which the plaintiff in error belongs. The exact question seems to have been determined by this court in the late case of *Seaboard Air Line v. Seegard*, which case was brought by writ of error from the State court of South Carolina, the question being the constitutional validity of a statute of that state, imposing a penalty on common carriers for failure to settle claims for loss or damages to property within a specified time. The law applied by its terms to both *intra-state* business and *inter-state* business, and as to the latter was, of course, void on its face. But the facts before this court related wholly to an *intra-state* shipment, and the Court said:

"The supreme court of the state held the section constitutional—a decision conclusive so far as the State constitution is concerned—and therefore we are limited to a consideration of its alleged conflict with the constitution of the United States. The shipment was wholly *intra-state*, being from Columbia, South Carolina, to McBee, South Carolina, and undoubtedly subject to the control of the state. It is of course unnecessary to consider the validity of the statute when applied to a shipment from without the state."

Seaboard Air Line Co. v. Seegard, et al.,
207 U. S. 73, 76,

and the judgment of the State court was affirmed.

The suggestion of the plaintiff in error that there is a criminal liability before this court, in the case at bar, is therefore not well made, and raises, at best, on the facts in this case, but a moot question for the determination of this court, and this court will not consider the same. The act in question on the facts in this case so far as any criminal liability is concerned does not apply to the plaintiff in error. In the case of *New York v. Reardon*, this Court had under consideration the constitutional validity of the law of New York imposing a tax on transfers of corporate stock, and said:

"The other ground of attack is that the act is an interference with commerce among the several states. Cases were imagined, which, it was said would fall within the statute, and yet would be cases of such commerce; and it was argued that if the act embraced any such cases it was void as to them, and if void as to them, void altogether, on a principle often stated.
* * *

But there is a point beyond which this court does not consider arguments of this sort for the purpose of invalidating the tax laws of a state on constitutional grounds. * * * It is that unless the party setting up the unconstitutionality of the State law belongs to the *class* for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. If the law is valid when confined to the class of the party before the court it may be more or less of a speculation to inquire what exceptions the State court may read into general words, or how far it may sustain an act that partially

fails. * * * Whatever the reason the decisions are clear, and it was because of them that it was inquired so carefully in the drummer cases whether the party concerned was himself engaged in commerce between the states."

Hatch v. Reardon, 204 U. S. 152, 160.

Again, note the case of *Uriah S. Lee v. New Jersey*, which was a case involving the laws of the State of New Jersey for the protection of the oyster beds of that state. Defendants were convicted of unlawfully *dredging* upon certain oyster beds. The act prohibited the *taking* of a dredge over an oyster bed. Defendants urged upon this court that the act might apply, therefore, to a person who merely *carried* a dredge over an oyster bed, and did not use it for the purpose of taking oysters, and that therefore the act was in violation of the constitution of the United States wherein is guaranteed the right of free commerce. But the court said of this contention:

"It is enough to say that in this case no such construction of the statute was made or enforced against the plaintiffs in error. Nor were they convicted because of any such state of facts, and it is well settled in this court that because a state statute when enforced in a state court against a class to which the party complaining does not belong, may work a deprivation of constitutional rights, that fact does not authorize the reversal of a judgment of a State court not enforcing the statute so as to deprive the party complaining of rights which are protected by the federal constitution."

Uriah S. Lee v. New Jersey, 207 U. S. 67, 70.

The Court further referred to the case of Hatch v. Reardon, *supra*, where all the authorities are cited. And on this same line of argument, it should never be forgotten that, the trespass in this case did not arise out of any mistake as to the boundaries of State land. The plaintiff in error well knew that it was cutting the timber on the land of the State. It was not the case, suggested by the plaintiff in error in its brief, when it complains of the rigor of this law, of an individual, who, by an honest mistake gets over the line of his own land on to the land owned by the State and cuts a tree thereon. Indeed it may well be urged on the authority of Lee v. New Jersey, *supra*, that the law in question has not been so enforced against the defendant as to raise *any* federal question. The defendant was not held liable because it trespassed upon State lands by mistake, or because it did not know where the boundary lines of the lands of the State were, or because it did not have information that the permit, under which it originally had a right to cut the timber, had not expired. True, it is claimed on behalf of the plaintiff in error, that it was misled in alleged good faith by the statements of a state officer, that the permit had been renewed. But plaintiff in error is bound to know the law, and with the law stated, explicitly, in the permit which plaintiff in error held, and under which permit it cut the timber of the State, it must be presumed and should be held to know, notwithstanding the alleged statement of the officer of the state to the contrary, that the permit had not

been and could not be extended. A person dealing with public officials is bound to know the extent of their official authority. In this case that principle is supplemented by the testimony of the public official who it was claimed had extended the permit, in violation of law, that he expressly disclaimed any authority to do so, and notified the defendant that no such power to extend existed. (P. T. f. 30, pp. 25, 26.)

But however that may all be, it is clear that there being no criminal liability alleged against the plaintiff in error, this court will not hold the statute unconstitutional on that ground as to this plaintiff in error. The law will not be held to be unconstitutional when applied to a state of facts which do not exist in this case.

THE FEDERAL QUESTION, IF ANY, INVOLVED IN THIS CASE.

However, assuming that this court should come to the conclusion that there is a federal question in this case, that the record presents it, and excluding the question as to criminal liability, that plaintiff in error is in the *class*, under the facts in this case, to which such federal question applies, the State then submits that this court will consider no other federal question than that presented to and considered by the State supreme court. In the case of *Waters Pierce Oil Company v. Texas*, the rule is succinctly stated as to what this court will review on writ of error to a state court, and the court says:

"It is well settled in this court that a review of the judgment of a state court is confined to the assignments of error made and passed upon in the judgment of the state court brought here for review. The assignments of error in this court cannot bring into the record any new matter for our consideration. * * * Where a state court decides a case upon an independent ground, not within the federal objections taken, and that ground is sufficient to maintain the judgment, this court will not review the case."

Waters Pierce Oil Co. v. Texas, *supra*.

On the *first* appeal in this case, State v. Shevlin-Carpenter Co., 99 Minn. 158, Appendix "B" hereof, where the trespass law was held to be constitutional, the court groups under four heads the questions which it says the assignments of error then presented to it for its consideration.

The court states:

"The questions presented by defendant in support of the demurrer, which we deem entitled to special consideration resolve themselves into four propositions or contentions, namely:

1. That the statute, in imposing a double liability for a casual or involuntary trespass, is obnoxious to those provisions of the state and federal constitutions which provide that no person shall be deprived of life, liberty or property without due process of law. That in declaring the casual or involuntary trespass a crime, it violates Sections 2 and 7 of Article 1 of the State constitution, as well as contravenes natural justice, and invades those natural rights, which if not directly, are impliedly, secured by the constitution, or are protected by the fundamental principles of the

social compact and exist independent of constitutional guaranty.

2. That in so far as it provides for the recovery of double or treble damages in a civil action, it contravenes Section 7, Article 1 of the State constitution, which provides, among other things, that no person shall be put twice in jeopardy of punishment for the same offense.

3. That the damages given by the statute being in the nature of a penalty, can be recovered only by way of indictment and criminal prosecution.

4. That the subject of the statute is insufficiently stated in its title.

In question No. 1, only, is there any reference to the federal constitution, and the point there made, is in reference to the provision of the statute subjecting an involuntary or casual trespasser to a double civil liability. Quoting from the answer of the plaintiff in error this point is stated as follows:

"These defendants allege that the provisions of Section 7, Chapter 163 of the General Laws of 1895, under which the plaintiff seeks to recover a penalty or enhanced damages from these defendants by reason of the alleged acts of trespass in said complaint set forth, is in violation and contravention of that portion of the Fourteenth Amendment to the constitution of the United States, wherein it is enacted and declared 'that no state shall deprive any person of life, liberty or property without due process of law,' and that the said provisions of Section 7 are also in violation and in contravention of natural justice and because they invade the natural rights of man, which are protected by the fundamental principles of the social compact."

This, then, is the only federal question in the case, if there be one, at all, and under the doctrine of *Waters-Pierce Oil Company v. Texas*, supra, is the only question which this court will consider at the suggestion of the plaintiff in error.

Eliminating then the verbage of the answer and the assignment in this court of that alleged error, which is a mere rhetorical flourish, and applying this federal question to the facts in this case, it may be stated thus:

DOES THE IMPOSITION OF A DOUBLE LIABILITY IN A CIVIL ACTION, ON A CASUAL OR INVOLUNTARY TRESPASSER, VIOLATE THE DUE PROCESS OF LAW PROVISION OF THE FEDERAL CONSTITUTION?

At the outset of the discussion so far as concerns "the contravention of natural justice," and the invasion of those "natural rights of man," which the plaintiff in error claims are protected by the "fundamental principles of the social compact" and exist "independent of constitutional guarantees," the State desires to say, that, in this case, where the average man upon the street would say there had been a deliberate and intentional trespass upon the lands of the State, to the injury of the State, but as to which, the supreme court of the State tempered the severity of the law by holding that the same constituted a "casual and involuntary trespass," and thereby treated the defendant with great consideration, it is difficult for the State to understand how "the rights of man" were invaded. The State takes this opportunity

to suggest that instead of the "rights of man" being invaded here, as plaintiff in error claims, it is rather a case where the rights of the State were *invaded* and the property of the State carried away and converted to the use of the plaintiff in error in defiance of all law, constitutional and otherwise, not to speak of those rights of *meum* and *teum*, which perhaps, may be justly regarded as the cornerstones of those principles of the "social compact" to which the plaintiff in error makes such extended reference. No further mention will be made of this phase of the argument of the plaintiff in error.

But further in the face of the wrong so committed by the plaintiff in error, the State utterly fails to understand, how the rendition of a judgment in a civil action, for *double damages only*, where under the facts in this case, had the State's supreme court so construed them, the plaintiff in error might have been held liable under the statute in *treble damages*, amounts to a *taking*, of the property of the plaintiff in error, without due process of law, as that term is used in the Fourteenth Amendment. As suggested before, plaintiff in error is in no position to complain about the severity of the punishment, either civil or criminal, or both, that might be meted out to someone else under this law. The hypothetical rights of imaginary persons, not before the court, are not here for adjudication. The plaintiff in error must show that the penalty imposed on it, this double civil liability, is not, in this case, *due process of law*

under the federal constitution, and unless it can show this, to the satisfaction of this tribunal, this writ of error must be dismissed. This then is the only question, if any, for discussion in this case.

In construing this statute the court should take into consideration the well known facts leading up to its adoption. No difficulty whatever will then be experienced in determining, at least, the legislative intent.

In common with many other central and western states the State of Minnesota has, since its organization, as the State supreme court aptly puts it, been

“possessed of large tracts of timber lands of incalculable value, upon which designing persons have persistently trespassed, cutting and removing therefrom valuable pine timber.”

To express it in another way, an empire, granted to the State by the federal government, for the use and benefit of the people of the State, was prior to 1895, being devastated and ruined, and by, and for, the benefit of private individuals; and, as the State supreme court further points out in this case:

“The State through its officials, has (had) been confronted with difficulties in detecting the guilty parties and bringing them to justice, and has (had) been defrauded and robbed of large sums of money by their acts. * * * The lands of the State were being stripped of their value by willful and reckless trespassers, and the great difficulty experienced by its officials in bringing guilty parties to justice under statutes which imposed a penalty only where the trespass was willful. In these con-

ditions the legislature deemed the property rights of the State would be best protected by dispensing in the future with the question of evil intent, casting upon the individual the burden of determining at his peril the boundary lines of land, from which he takes and removes standing pine." * * *

Therefore,

"it was finally thought necessary to enact a very stringent law to prevent future trespasses, and the drastic statute under consideration was the result."

State v. Shevlin- Carpenter Co., 99 Minn. 158.

The question then for this court to determine is, whether *under such circumstances*, the legislature may not say, that, the person who becomes a *casual* and *involuntary trespasser* upon the pine lands of the State must pay *double* damages for the pine that he *unlawfully* takes, and if the legislature does so provide, does such enactment violate the Fourteenth Amendment to the constitution of the United States, insofar, as the same prohibit the taking of property without due process of law.

What constitutes "due process of law" as defined by the amendment in question, this court has said may not be given a definition, "broad enough to cover every case."

"In England the requirement of due process of law in cases where life, liberty and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of 'law of the land,' and a similar purpose must be ascribed to them when

applied to a legislative body in this country; that is, they are intended in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoilation of property. But from the number of instances in which these words are invoked to set aside the legislation of the states, there is abundant evidence as observed by Mr. Justice Miller in the case referred to, 'that there exists some strange *misconception* of the *scope* of this provision as found in the Fourteenth Amendment.' It seems, as he states, to be looked upon 'as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.' * * * If the laws enacted by a state be within the *legitimate sphere of legislative power*, and the *enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes* for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty or property without due process of law.' * * * Our jurisdiction cannot be invoked unless some right claimed under the constitution, laws or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of illadvised and oppressive state legislation."

Missouri Pacific Railway Co. v. Humes,
115 U. S. 512, 519.

(Italics ours.)

Now there is no claim here but that the *enforcement* of this law was attended with all the observances of "those general rules which our system of jurisprudence prescribes," and, as heretofore point-

ed out, there is no question before this court of the *deprivation* of any person of *life or liberty*. So that, under the foregoing rule laid down by this court, and the point raised by the pleadings and the assignments, if any there be, the discussion, here, has only to do with the *legitimate sphere of legislative power*. To put the matter in another way, may the State legislature, under the circumstances detailed above, pass an act which takes away the question, and the necessity of proving an intent, and may it provide in effect that a person, who, as a casual and involuntary trespasser takes State timber, shall pay *double* damages for the timber which he unlawfully takes? May the legislature say that he who takes State timber, when he takes it *casually* and *involuntarily*, as well as when he takes it *willfully*, takes such timber at his peril? If these questions are to be answered in the affirmative, and the supreme court of the State of Minnesota, in common with many other courts, believes that they are, upon what foundation then does such a right exist?

There are certain acts which, from the beginning of society, have been looked upon by all civilized, normal, people with detestation, and for the commission of which, punishment of some kind has always been meted out. They may be denominated as the primeaval and elemental crimes and offenses, so long, indeed, has mankind prohibited them and punished their commission. In fact so long have they been condemned by society, generally, that most people intuitively shrink from their

commission. Without naming the balance of these crimes it is enough to say, in connection with the present discussion, that one of them is the *taking* of the property of another without his knowledge or consent. When it is done willfully it becomes *stealing*, but when done by mistake or inadvertance, casually or involuntarily, while it may not be *stealing*, it is still, nevertheless, the taking of anothers property, and therefore a wrong done such other person. Of course, at all times and under all circumstances, a duty rests upon all men to do their neighbor no wrong. When a wrong be done, therefore, whether it be done willfully or casually, so far as the person wronged is concerned, is of no moment. When the wrong consists in taking the property of another without his consent, it is immaterial whether it be done willfully or casually. The owner of the property is just as effectually deprived of his property, in the one case as in the other, and the person who takes it, in either case, whether he takes it willfully or as a casual or involuntary trespasser, likewise gets the benefit of it. But the taking, in either event, being a wrong, the same may be punished, criminally, in certain cases, or by the imposition of additional money damages in others, or by both, for—

“Any neglect of duty imposed for the protection of life and property is culpable, and deserves punishment.”

Missouri Pacific Railway Co. v. Humes,
supra.

Whether the foregoing furnishes the true foundation for the imposition of double damages by the legislature of the State of Minnesota against one, who, casually and involuntarily takes public timber, is immaterial. It is *one* of the foundations, and a reasonable one at that, on which the legislature might build. And,

"One of the exclusive provinces of the legislative departments of government is to declare what acts or omissions shall constitute a crime, to define the same and provide such punishment therefor as may be deemed appropriate; and unless the constitutional rights of the citizen be invaded, its determination in all such matters is conclusive upon the court."

State v. Shevlin-Carpenter Co., 99 Minn. 158.

Therefore, it is quite apparent, that, generally speaking, the legislation in question is, to quote the eminent authority before mentioned, "with ⁱⁿ the sphere of legislative power," and unless it shall further appear, that, by the imposition of *double damages* or by the removal of the necessity of proving an *intent*, the legislature has taken the act in question outside of such sphere of legislative power, the act at bar must be sustained.

DOUBLE DAMAGES. Now at all times and under all circumstances there rested upon the plaintiff in error the duty not to take the timber of the State unlawfully. Yet in the case at bar it must be conceded that the plaintiff in error did, unlawfully take such timber; because, in the case at bar, the court has so found, and such finding is the

law of this case.

State v. Shevlin-Carpenter Co., 102 Minn. 470, 476.

Gatewood v. North Carolina, 203 U. S. 531.

To paraphrase the preceeding discussion, in the case at bar the State is out its timber, wrongfully taken by the plaintiff in error. The State was thereby wronged, and it is immaterial whether the plaintiff in error took the timber, intentionally, or only as a casual and involuntary trespasser. In either event it has the State's timber, and has converted it to its own use. Now, basing its action upon the wrong that might be done the State in a like case the legislature passed the act in question, and

"The statute was intended to establish a definite measure of damages in all cases of trespass upon State lands, and to that end treble damages are provided for a willful, and double damages for a casual or involuntary trespass, thus wholly abrogating the rules of the common law in such cases."

State v. Shevlin-Carpenter Co., 99 Minn. 158.

The legislature therefore fixed the rule of damage arbitrarily. It might have given to a jury the right to fix the amount of recovery, within certain limits, or it could assume that right itself. It elected to do the latter, and there can be no objection thereto.

"The legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion."

Missouri Pacific Railway Co. v. Humes,
supra.

No one will deny that the foregoing is a correct statement of the rule, where the rights of private persons are involved. For,

"It is fully settled by the decisions of this court that in actions for torts, where there has been fraud, malice or oppression on the part of the defendant, the jury may allow what are denominated exemplary or punitive damages—that is, damages beyond the mere pecuniary loss or injury to the plaintiff and intended as in some measure a punishment upon the defendant for the wrong done, and *as an example to deter others from similar acts.*

Boetcher v. Staples, 27 Minn. 308.

And such is the rule in other jurisdictions.

Brown v. Evans, 8 Sawy. 488; 17 Fed. 912.

Smith v. Bagwell, 19 Fla. 45 Am. 12.

Hendrickson v. Kingsbury, 21 Ia. 379.

Brown v. Swineford, 44 Wis. 282; 28 Am. 582.

Mayer v. Frobe, 40 W. Va. 246.

Nor can any good and valid reason be given why this rule, in force from the earliest days among private parties, should not at this day be extended to the State, where the latter is acting in its proprietary capacity.

Let us again refer to the facts. The State was the owner of certain pine timber of great value. Without a valid permit the plaintiff in error, unlawfully took such timber and converted it to its own use. Thus a wrong was done to the State. If this transaction had happened between private

individuals, in a proper case, the jury would have been permitted, or, the legislature could have provided, that the court might arbitrarily fix additional damages,—damages, as as the Minnesota court well puts it, “as an example to deter others from similar acts.” True it is that in the case of a private individual such damages are given as smart money, and as additional compensation for the injury to the feelings of the outraged individual. True it is, further, that the State, as such, has no feelings that may be outraged. But in answer to this argument of the plaintiff in error it is respectfully suggested that the public conscience of the people of the State of Minnesota had long prior to the passage of the act in question, been outraged by the continued and persistent theft of the pine timber of the State, open and notorious, and of common knowledge throughout the State, and yet of such a character that it was impossible of demonstration before the courts. In this state of affairs, whether as additional compensation to the public thus outraged, or “to deter others from similar acts,” the legislature passed the act in question. The State is of the opinion that the motive which induced the legislature to thus act, is not material. The ultimate fact is that it did so decree, and did provide that under such circumstances any person, including the plaintiff in error, who should, unlawfully, take the State’s timber, should pay an amount, if he were a casual and involuntary trespasser, equal to double the value of the timber taken. That is to say, the legis-

lature thus provided for enlarged damages for the civil wrong which the plaintiff in error has done the State.

The supreme court of Minnesota in speaking of this same matter has well said that :

"Whatever in legal contemplation exemplary damages may be, whether properly termed aggravated relief, or an penalty pure and simple, they are not imposed in the sense of or as a substitute for criminal punishment but rather as enlarged damages for a civil wrong. No sound reason occurs to us why the State in preservation of the property entrusted to it for the use and benefit of the people, should not be granted all remedies that are afforded and extended individuals in the protection of their property and property rights. Indeed potent reasons might be suggested for granting the State special privileges in this respect. Its property, particularly school lands, is located in remote parts of the State, and it is without adequate facilities for guarding and protecting the same from trespassers. Its lands have been denuded of valuable timber year after year, and the school fund of the State has thus been greatly depleted. If the legislative department is without power to extend to it the rights possessed and granted the individual, the equal protection of the law in its property rights would be denied it. Statutes tempered in moderation as to penalty have proven in the most ineffectual, and unless the stringent features of the present statute are sustained in all respects, trespasses will continue in the future with impunity."

State v. Shevlin-Carpenter, 99 Minn. 158.

However that may be, on the record, the plaintiff in error by its acts did the people of the State of Minnesota a great wrong, and while such wrong was done to them in their proprietary capacity,

yet the same people in their sovereign capacity had said that the person who should do such wrong, should pay to it double damage. In *Missouri Pacific Railway Co. v. Humes*, supra, this court held in effect, that, for the negligence of the railway company in failing to erect a suitable fence, in violation of the statute of Missouri, the railway company could be held liable in double damages. The State respectfully suggests, therefore, under this holding, that no good reason suggests itself why, conceding power in the legislature to fix the limits of the punishment within reason, if negligence may thus be punished, unlawful trespass should not have a like reward.

INTENT.—There remains the question of the lack of intent.

It is conceded that the act provides, and that the State supreme court construes the act to be constitutional when it so provides, that a "*casual and involuntary*" trespasser upon the pine lands of the State may be held to a double liability for the timber then taken.

State v. Shevlin-Carpenter Co., 99 Minn. 158.

State v. Shevlin-Carpenter Co., 102 Minn. 470.

And that such construction measures the question before this court for review.

Leffingwell v. Warren, 2 Black. 599.

Oakes v. Mase, 165 U. S. 363.

Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, supra.

Bearing in mind, always, that the question of the criminal liability of the plaintiff in error is not before this court, the question then is, does the statute, so construed, render it unconstitutional within the due process of law provision of the Fourteenth Amendment to the constitution of the United States.

The facts and the circumstances leading up to the passage of this law, having been just called to the attention of the court, in the preceeding discussion, no further reference need be made thereto here. Suffice it to say that *under such circumstances* the legislature deemed that:

"The property rights of the State would be best protected by dispensing in the future with the question of evil intent, casting upon the individual the burden of determining at his peril the boundary lines of land from which he takes and removes standing pine."

State v. Shevlin-Carpenter Co., *supra*.

The State believes, and the authorities confirm it in that belief, that the legislature had the right to enact such a statute *under such circumstances*, and therefore had the right, *under such circumstances*, to take away the necessity of charging and proving knowledge. The courts sustain this view of the matter where statutes imposing a criminal liability have been under discussion, and it is but fair to urge, that, if a statute imposing a criminal liability, which takes away the necessity of charging and proving evil intent, may be thus sustained, where the punishment inflicted thereunder is imprisonment and the deprivation of one's liberty,

surely the courts may be relied to uphold a statute, under the circumstances detailed in this case, where the only punishment involved is a money damage for property taken in unlawful trespass.

In Clark & Marshall's Law of Crimes, (page 103,) the law on this subject is correctly summed up as follows:

"Public policy may require the legislature in prohibiting and punishing particular acts under certain circumstances, to provide expressly or impliedly, that any person who shall do the act shall do it at his peril, and that he shall not be allowed to escape punishment by showing that he acted in good faith without negligence, and in ignorance of the existence of the circumstances rendering the act unlawful. If the language and subject matter of the statute show clearly that this was the intention of the legislature, the courts must give it effect however harshly the statute may seem to operate in the particular instance."

Clark & Marshall's Law of Crimes, p. 103.
Commonwealth v. Wentworth, 118 Mass. 441.

Regina v. Woodrow, 15 Mees. & W. 404.

Halstad v. State, 41 N. J. L. 552.

Commonwealth v. Connolly, 163 Mass. 539.

State v. Keley, 54 Oh. St. 166.

State v. Smith, 10 R. I. 258.

State v. Huff, 89 Me. 521.

State v. Zichfeld, 23 Nev. 304.

People v. Waldvogel, 49 Mich. 337.

People v. Robe, 52 Mich. 577.

State v. Presnell, 34 N. C. 103.

State v. Quackenbush, 98 Minn. 515.

That the legislature in its discretion may so provide the authorities, as before suggested, are practically unanimous. The supreme court of Massachusetts, in the case of *Commonwealth v. Murphy*, had under consideration the statutes of that state providing that one who carnally knows and abuses a female child under the age of sixteen years, was in effect guilty of rape. The defendant contended, that, because he did not know that the female in question was under the age of sixteen years, he could not be convicted. The punishment provided for was life imprisonment and the court said:

"There is a large class of cases in which on grounds of public policy certain acts are made punishable without proof that the defendant understands the facts that give character to his act. In such cases it is deemed best to require everybody at his peril to ascertain whether his act comes within the legislative prohibition.
 * * * *Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question in interpreting a criminal statute is whether the intention of the legislature was to make knowledge of the facts an essential element of the offense, or to put upon everyone the burden of finding out whether his contemplated act is prohibited, and of refraining from it if it is.*"
 (Italics ours.)

Commonwealth v. Murphy, 165 Mass. 66,
 30 L. R. A. 734.

In this case the supreme court of Massachusetts sustained the conviction.

This act then, of the legislature of the State of

Minnesota, is, therefore, analogous to statutes prohibiting the sale of liquor to minors, the honest belief of the person making the sale that the minor was of age, being no defense; to statutes prohibiting the sale of adulterated food and tobacco, the honest belief of the person selling the same that they are not adulterated being no defense; to statutes imposing double damages for injuries done by vicious dogs, killing or injuring sheep, the owner of the dog not knowing of its vicious propensities; to statutes prohibiting the unlawful acceptance of deposits in banks where the defendant honestly believes himself to be solvent.

Tronpen v. Verhage, 54 Mich. 304.

Newton v. Gordon, 72 Mich. 642.

Kerr v. O'Connor, 63 Penn. St. 341.

Chickering v. Lord, 67 N. H. 555.

State v. Hartfield, 24 Wis. 60.

The distinction seems to be in these cases, that where the act is *malum in se*, a guilty intent becomes a part of the offense, but where the act in question is only *malum prohibitum*, no such guilty intent is necessary. In other words, where the statute contains nothing requiring the act to be done knowingly, and the act in its self is not *malum in se* nor infamous, but only wrong because it is prohibited, a criminal intent need not be proven. The offender is bound to know the law and obey it at his peril. In *United States v. Leathers*, the defendant was convicted of trading within Indian territory, and with introducing liquors therein.

The defense was that the defendant did not know where the true line of the reservation lay, and by reason of certain facts honestly believed that he was outside of its boundary line. Sustaining the conviction the Court said:

"The statute contains nothing requiring these acts to be done knowingly. The acts themselves are not *malum in se*. The object of the law is not to punish men for these acts as crimes, so much as to prevent trading and intercourse with the Indians otherwise than as the law permits. There is nothing infamous in the punishment prescribed. Under these circumstances I think it is immaterial with what intent the acts were done. They belong to that class of acts which, in the absence of the statute, might be done without culpability, and being such, such ignorance of the lines of the reservation will not excuse, nor will a sincere belief by the defendant that he is outside the line."

United States v. Leathers, 6 Sawy. 27.

The identical question before this court in connection with the statute at bar, has been before the supreme courts of the State of South Dakota in *State v. Dorman*, and the supreme court of Michigan in *People v. Christian*, and in both instances has been determined by such courts in accordance with the doctrine of the Minnesota court in this matter. In the Michigan case particularly, the statute under consideration provided that every person, not lawfully authorized, who should enter upon, or induce any other person, to enter upon lands owned by the state, and cut and remove timber therefrom, should be guilty of a felony, and punished by imprisonment, or by fine or by both.

As in the case at bar, a former statute of Michigan had provided for punishment only when the trespass was willful. In the Christian case, as also in the case at bar, it appeared that the State had been defrauded of thousands of dollars worth of valuable timber, and that it was practically impossible to convict the persons taking the same. Thereupon the legislature of the State of Michigan, determined to put a stop thereto, passed the act under review in that case, and eliminated the question of evil intent. But the supreme court of the State of Michigan, as the supreme court of the State of Minnesota in *State v. Shevlin-Carpenter Co.*, 99 Minn. 158, aptly remarks,

“had no difficulty in reaching the conclusion that the legislature, not only intended to eliminate the question of evil intent, but possessed the power to so enact.”

People v. Christian, 144 Mich. 247, 107 N. W. 919.

State v. Dorman, 9 S. D. 528.

Nor does such a statute violate the federal constitution as to due process of law.

Missouri Pacific Railway Co. v. Humes, *supra*.

It therefore follows that insofar as the statute in question provides for the payment of *double damages* for the property so taken by *unlawful* trespass, and insofar as it eliminates the question of *evil intent*, it does not offend against the Fourteenth Amendment to the Constitution of the United States wherein is prohibited the taking of property without due process of law; and hence

that this court ought to, and will, dismiss this writ of error, for it is established beyond question that this court will not review a matter unless the act of the legislature of the state complained of, violates the federal constitution in the manner suggested by the plaintiff in error.

“Our jurisdiction can not be invoked unless some right claimed under the constitution, laws or treaties of the United States is invaded.”

Missouri Pacific Railway Co. v. Humes,
supra.

Lee v. New Jersey, supra.

Hatch v. Reardon, supra.

But finally, and as a cogent reason, why this statute should not be declared unconstitutional the State desires to impress upon the court the evils which will inevitably flow from such action.

As heretofore pointed out, this statute was a result of a condition which existed in Minnesota, by which the public lands of the state were being devastated by designing persons and the property of the State taken for their own private benefit. The amounts so unlawfully taken, run unquestionably into the millions of dollars, and while recovery has been had for a certain portion of the property thus taken, the statute of limitations, civil and criminal, or the inability to ascertain the facts, preclude, further recovery or punishment. The legislature of the State confronted with this situation passed this act, drastic, but nevertheless effective. *Thereupon the theft of State timber and the taking of it “casually and involuntarily,” practically ceas-*

ed. To now declare the act unconstitutional would be to open a way, at least to men so disposed, to again loot the property of the state, and to a recurrence of the exact state of affairs which the act was intended to, and did effectually stop. The legislature will not convene in regular session for a year, and that period would elapse before any effective legislation might again be placed upon the statute book. To declare this act unconstitutional, at the present time, would take away from the State the sole protection which exists for the preservation of the pine and other timber property of the State and its people. To put this phase of the matter in the current language of the day, this statute is real and effective conservation, and therefore, as a matter of public policy, as well as a matter of law, the writ of error of the plaintiff in error should be dismissed.

THE BRIEF OF PLAINTIFF IN ERROR.

The foregoing argument being sound, the brief of the plaintiff in error is to be disposed of as follows: Subdivisions I, II and III thereof, and the Fourth assignment of error in this court, either refer to a *class* to which plaintiff in error under the facts in this case does not belong; or were not presented to the court below; and in neither event will be considered here. Subdivision IV thereof is fully answered in the preceeding pages of this brief. Subdivision V refutes itself without argument.

In conclusion, as to plaintiff in error's repeated

assertion and suggestion herein that in the case at bar:

"The plaintiff in error have not even the privilege of establishing its innocence,"

the State of Minnesota respectfully suggests that the plaintiff in error when charged with the unlawful taking of the State's timber can always plead "not guilty" thereto, and thereupon have its day in court on that issue, and if it can show that such is the fact,—that it did not take the state's timber, unlawfully—the State of Minnesota, and no citizen thereof would ever in such case desire recovery.

Respectfully submitted,

GEORGE T. SIMPSON,
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LYNDON A. SMITH,
Assistant Attorney General.



APPENDIX "A."

CHAPTER 163, LAWS OF MINNESOTA, 1895.

An act regulating state lands and the product of the same, and to repeal certain acts and parts of acts.

Be it enacted by the Legislature of the state of Minnesota.

SECTION 1. That at the time of the sale of any school lands the commissioner shall execute under his hand and official seal, a certificate of sale which shall be signed, sealed and acknowledged by the commissioner, which said certificate shall be delivered to the purchaser.

The said commissioner shall certify the description of the land sold, the quality thereof, and the price per acre, the consideration paid and to be paid therefor, and the time and terms of payment.

Such certificates shall be numbered and made assignable, but no certificates shall be delivered to the purchaser by the commissioner until the sum of money required by law to be paid at the time of the sale, is paid to the treasurer of the county where said sale takes place, and in case the purchaser fails to pay the amount so required to be paid at the time of said sale, said commissioner may again immediately offer said land for sale; but no bid shall be received from the person so failing to pay as aforesaid.

SEC. 2. Whenever any certificate is assigned, the assignment shall be made in writing, and shall be signed, sealed and acknowledged by the assignor, and executed in the presence of two witnesses, in case of any extension of the time of payment provided for in any such certificates, such extension shall be made in writing and under the hand and seal of the said land commissioner, in such a manner as to show the date when the extension is made, and the period and terms thereof, and such extension shall be recorded in the office of said land commissioner in a book provided for that purpose.

The commissioner may, in his discretion, on or before the day of sale, withdraw any lands that may have been advertised for sale and included in any list to be offered in any county.

SEC. 3. The said certificate shall further set forth that, in case of the non-payment of the annual interest by the first day of June, or within six (6) days thereafter, in each and every year, by the purchaser, or by any person claiming under him, then the said certificate may at any time during said default be by the commissioner declared void, and the said commissioner may take possession of the land therein described, and re-sell the same at public auction, and in the same manner and under the same rules and regulations as provided for the first sale.

SEC. 4. The governor shall sign and cause to be issued under the seal of the state land office of this state, and attested by the commissioner, patents for

the lands described in the certificate of sale, whenever the same are presented to him, with the further certificate of the commissioner endorsed thereon, that the whole amount of principal and interest specified therein, and all rents and taxes due on said lands have been paid, and that the holder of the certificate is entitled to a patent of the lands described therein; and the governor shall, in like manner sign and cause to be issued patents of said land, to any purchaser of the right, title and interest of the original purchaser, his heirs or assigns, at an execution or mortgage sale, upon presentment to him of the certificate of the commissioner, that the whole amount of principal, interest, rents and taxes due thereon has been paid according to law and that said purchaser at execution or mortgage sale is entitled to a patent for the land described in such certificate, and said patent shall be recorded in the office of said land commissioner, in a book to be provided for that purpose.

SEC. 5. Whenever, the interest of the state will be promoted, in the opinion of the commissioner, by laying off any portion of the land under his control into small parcels or village lots, said commissioner may cause the same to be done, and shall cause the same to be appraised as provided in the next section:

Provided, however, that whenever a petition in writing is presented to said land commissioner, requesting him to have the land therein described subdivided into small parcels or village lots, and said petition is signed by at least ten (10) legal

voters of the county in which the land therein described is situated, the said petition shall be submitted to the board of timber commissioners, hereinafter constituted, which shall meet for the consideration thereof, and if the subdivision as prayed in such petition shall be recommended by the governor and at least one other member of the board, the request of such petitioners shall be granted. The action of said board shall be endorsed upon the back of such petition in writing and signed officially by the members of said board.

Whenever such petition is made, and whether the same be granted or refused, it shall be filed in the office of said land commissioner, and the date of filing noted thereon.

SEC. 6. The appraisers provided for by law shall be appointed as follows, viz: One (1) by the governor, one (1) by the commissioner of the state land office, and the other by the county commissioners of each county in which the lands to be appraised or sold, are situated, or if such county is unorganized the county to which it is attached for judicial purposes. Each appraiser shall, before entering upon the duties of his office, take and subscribe an oath, before some person qualified to administer oaths, that he will faithfully and impartially discharge his duties as appraiser, according to the best of his ability, and that he is not interested, directly or indirectly, in any of the school lands or improvements thereon, and has entered into no combination to purchase the same or any part thereof, which said oath shall be attached to

the report made of such appraisal, as hereinafter provided. Each appraiser shall be allowed, as compensation for his services and expenses, three (3) dollars per day, to be paid out of the state treasury.

The appointment of such appraisers shall be made in writing, and shall, together with their oaths and the written appraisals made by them, be filed in the office of said land commissioner.

SEC. 7. *If any person, firm or corporation, without a valid and existing permit therefor, cuts or employs, or induces any other person, firm or corporation to cut, or assist in cutting any timber of whatsoever description, on state lands, or removes or carries away, or employs, or induces or assists any other person, firm or corporation to remove or carry away any such timber, or other property, he shall be liable to the state in treble damages, if such trespass is adjudged to have been willful; but double damages only in case the trespass is adjudged to have been casual and involuntary, and shall have no right whatsoever to any remuneration or allowance for labor or expenses incurred in removing such other property, cutting such timber, preparing the same for market, or transporting the same to or towards market.*

Whoever cuts or removes, or employs or induces any other person, firm or corporation to cut or remove any timber or other property from state lands, contrary to the provisions of this act, or without conforming in each and every respect thereto, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding one thou-

said (1,000) dollars, or by imprisonment in the state prison not exceeding two (2) years, or by both in case the trespass is adjudged to have been willful.

Whenever any timber so cut is intermingled with any other timber, or whenever other property taken from state lands is intermingled with other property, the state may seize and sell the whole quantity so intermingled, pursuant to the provisions of section forty (40) of this act, and such other timber or property shall be presumed to have been also cut from state lands.

Provided the intermingling of timber above referred to shall only apply to cases having been adjudged as willful trespass.

SEC. 8. Whenever, in the opinion of the commissioner, it will be for the interest of the people of this state that an appraisal of any of the school lands, or of the improvements thereon, shall be made, appraisers shall be appointed as provided by section six (6) of this act, who shall qualify and be paid according to the provisions thereof.

Said appraisers shall proceed to appraise such lands and the improvements thereon, if any, as the commissioner may direct, and the valuation of such lands and improvements shall be separately made and stated in the appraisal, and the minimum price established by such appraisal shall be the minimum price for such lands until changed by a subsequent appraisal; but no lands shall be sold for less than the minimum price established by law, and not more than one hundred thousand (100,000)

acres of school lands shall be sold in any one (1) year.

The appraisals so made, as aforesaid, shall be filed in the office of said commissioner; *provided*, however, that no sale shall be made upon any appraisal that was made more than four (4) years prior to the date of sale.

SEC. 9. Before any sale of any school lands is made, the commissioner of the land office shall cause notice of the time and place of such sale to be published in one newspaper printed and published at St. Paul, and one newspaper printed and published in each county in which such lands are to be sold, if any newspaper is printed and published in such county.

Said notice shall be published once a week for four (4) successive weeks prior to said sale, and shall contain the description of such piece or parcel of land to be sold.

In case there is no newspaper published in said county, said commissioner shall also cause such notice to be posted in three (3) conspicuous places in said county at least four (4) weeks prior to said sale.

SEC. 10. All moneys received from the sale of any school or university lands, or the timber or other property coming therefrom, or interest accruing from such sales, shall be paid into the state treasury, and the purchase money so received shall be loaned as provided by law, or invested in Minnesota bonds (railroad bonds always excepted), or

in United States bonds, bearing not less than three (3) per cent interest, or in bonds of any state.

Provided, however, that no investment of such funds shall ever be made in bonds which may have been issued to aid in the construction of any railroad; and the governor, treasurer, state auditor, president of the board of regents of the State University, and the chief justice of the state, are hereby constituted a board of commissioners, whose duty it shall be to invest said funds; and whenever there shall have accumulated in the treasury funds belonging to said permanent school fund, or the permanent university fund, or both, to the amount of ten thousand (10,000) dollars, it shall be the duty of said board of commissioners to immediately invest the same according to the provisions of this section. The state auditor shall be secretary of the said board of commissioners.

He shall keep a record of all the proceedings of said board, and shall cause the same to be published with his annual report. It shall be the duty of the state treasurer to place to the credit of the respective funds, when received, the interest accruing on said bonds, and pay over the same as directed by law.

The bonds purchased in accordance with this section shall not be transferable, except upon the order of the governor; and on such bonds shall be written "Minnesota School Fund Bonds," or "Bonds of the University of Minnesota," as the case may require, "transferable only upon the order of the governor and state auditor."

The state auditor shall keep a record of such bonds, stating the name of bonds, when issued, when redeemable, rate of interest, when and where payable, number and amount of bond, by whom executed, when purchased, when withdrawn, and for what purpose; and he shall credit the state treasurer for such bonds when purchased, and charge the same to the proper fund.

SEC. 11. The commissioner may sell the pine timber or the pine lands in this state, and tamarac and cedar suitable for posts, telegraph poles or railroad ties, when the same is liable to waste, and not otherwise. No such timber shall ever be sold or disposed of unless the same is liable to waste, when such sales are made said commissioner shall execute and deliver to the purchaser a permit to enter upon the land upon which the timber is growing and to take and remove such timber. Before any permit shall be granted, the timber shall be estimated and appraised but no sale shall be made on any estimate or appraisal more than three (3) years old. The land commissioner is hereby authorized and empowered to appoint such competent persons as may be necessary to examine such lands for the purpose of estimating and appraising the timber thereon; they shall be known as state estimators; the commissioner may discharge them from time to time as he deems best. At least one of such estimators shall make a thorough and exhaustive examination, whenever and as often as called upon by said commissioner so to do, of every piece or parcel about to be sold and prior to the sale.

SEC. 12. Each estimator shall enter his report of such examination in a book to be provided and kept for that purpose by said land commissioner in his office.

Such books shall be known as the record of appraisals, and is hereby expressly made the original record of such examinations, estimates and appraisals.

Each estimate and appraisal shall be entered in said record by the estimator who has made the examination, in his own handwriting, and said record shall be signed and dated by him at the time of such entry.

Said record shall be made from the original notes of said estimator, which he shall make upon the ground where said timber is grown.

Such record shall show the amount of each kind of timber upon the land examined which measures not less than eight (8) inches in diameter twenty-four (24) feet from the ground which is subject to sale under the provisions of section eleven (11) of this act, the number of logs per thousand (1,000) feet, and the value per thousand (1,000) feet thereof, and also the amount and value of all other kinds of timber thereon below this standard, including the number of pine, tamarac and cedar posts, telegraph poles and ties, and their value.

SEC. 13. Each estimate shall be made by governmental subdivisions, and no estimate shall relate to more than forty (40) acres of land, save and except where the smallest governmental subdivisions show

more than that number of acres.

Each estimate shall state the situation of the timber referred to therein relative to its risk from fire or damage of any kind, and its distance from the nearest lake, stream or railroad, the character of the haul, and whether or not any of said timber has been burned, and the extent and character of the burning, if any.

It shall also show the true date when the examination was made, the exact number of hours spent in making the examination; that the estimator was actually upon the ground when he made said estimate, the expense necessarily incurred in making such examination and in going to and returning from said tract.

Each estimate shall be sworn to by the estimator upon the record thereof before the secretary of state, or a notary public employed in his office.

Each estimator, at the time he makes the entry of his estimate, as aforesaid, shall file in the office of said land commissioner, all the plats and field notes made by him on the ground during his examination, and he shall affix his signature to each plat and to each page of field notes, together with the date of filing the same.

No information, estimate or appraisal relating to standing timber upon any public lands shall be paid for out of the state treasury, or shall be furnished by any person other than the estimator herein provided for, or in any other manner than as herein provided.

SEC. 14. Each estimator shall be a citizen of the State of Minnesota, and shall be thoroughly qualified by actual experience to carefully and accurately run the lines of the various subdivisions of land, according to the government survey thereof, to determine courses and distances, to locate corners, meander posts and witness trees, to correctly read the same when found, to correctly locate himself when in the woods, and to make accurate and complete estimates and appraisals of the timber on such lands. No person shall be appointed as such estimator who has not had at least five years actual practical experience in the woods in the direct line of the work hereby required. Before any person shall be appointed as such estimator, he shall make and verify a statement setting forth that he possesses all the qualifications required by this act, and such verified statement shall be filed in the office of said commissioner.

SEC. 15. No person, other than those appointed and who shall qualify as herein provided, shall be allowed to act as such estimator or be paid by the state for making any estimate or appraisal.

Each estimator at the time of his appointment, and before entering upon his duties, shall take and subscribe an official oath, and give a bond with at least two (2) sureties in at least the sum of five thousand (5,000) dollars for the faithful performance of his duties. Said bond, together with the sureties thereon, shall be approved by the land commissioner who shall endorse his approval thereon. Said bond and oath shall be filed in the office of said

land commissioner. Whenever and as often as any reports shall be signed by the estimators, as herein provided, the land commissioner shall furnish to the governor written lists containing a description of the land examined, and the value, quantity and character of the timber thereon, which list shall be filed in the office of the governor.

All estimates or purported estimates now on file in the office of the land commissioner and upon which valid permits are not now in force, are hereby cancelled and declared null and void.

SEC. 16. Any estimator who shall make or cause to be made any false or fraudulent estimate of the timber upon any such land, or who shall insert in any estimate any false statement whatsoever, or who shall falsely date any record, or who shall make any false statement as to his experience and qualifications for the work, to the land commissioner, or who shall fail to make a personal examination of each subdivision of land, as required by law, before making the record of such estimate, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one thousand (1,000) dollars for each offense, or by imprisonment in the county jail for a term not exceeding one (1) year, or by both.

SEC. 17. It shall be the duty of said commissioner to make a thorough inquiry and examination into the extent, character and value of the lands belonging to the state, and chiefly valuable for the timber thereon.

He shall take such measures as will protect such timber from damage or loss by fire, trespass or otherwise, and make such regulations for the care and control of said timber lands and sales of the timber thereon subject to sale under the provisions of section eleven (11) of this act as will best protect the interests of the state; *provided*, however, that he shall do nothing which shall conflict with the provisions of this chapter.

SEC. 18. There is hereby established the board of timber commissioners, to be composed of the governor, auditor and treasurer of this state.

The governor shall be the chairman of said board and shall preside at all meetings.

Before any timber shall be sold the land commissioner shall submit to said board, which shall meet from time to time for such business as may be laid before it, the records of estimates and appraisals, and said board shall carefully examine the same together with such other papers, documents, records or witnesses as the commissioners may require in order to properly determine the questions submitted to them.

The governor is hereby authorized and empowered to administer an oath, in the usual form, to each witness brought before such board, and each commissioner is hereby authorized and empowered to examine such witnesses relative to the matters under advisement.

The land commissioner shall act as secretary of said board, and shall keep a record thereof containing the full minutes of each meeting, and all the

proceedings thereof, which minutes shall be dated at the time when such meeting occurs, and shall be signed by the commissioners present.

Whenever the question of the sale of any timber on such land is submitted to said board, it shall determine whether or not such timber is subject to sale under the provisions of section eleven (11) of this act, and if it is for the best interests of the state that such timber shall be sold, and whether or not a sale is necessary to protect the state from loss, the determination of the board shall be preserved in the records of the meeting, together with the evidence showing that such timber is subject to sale under the provisions of section eleven (11) of this act.

The governor and one other member of said commission shall constitute a quorum for the transaction of business. In case the governor, and at least one other member of said board, shall determine by their votes that any such sale is necessary to protect the state from loss, and before any timber shall be advertised or sold, or any permit issued for entering upon or cutting the timber from any such land, they shall endorse upon the record of each and every estimate of timber so to be advertised and sold, the statement that such sale is necessary to protect the state from loss. Said statement shall be signed by them officially, and the date of such signing affixed thereto, and unless this is done the land commissioner shall have no jurisdiction whatsoever to make such sale.

SEC. 19. The governor is hereby authorized to appoint a competent agent of his own selection, to

properly investigate the correctness of any such estimate and appraisal, and to send such agent to examine any of the timber proposed to be sold, for the purpose of ascertaining if same is subject to sale under the provisions of section eleven (11) of this act, and to ascertain if any trespass has been committed on state lands or to ascertain the correctness of the weight and quantity of ore mined on state lands, whenever and as often as in his judgment it is for the interest of the state so to do.

Said agent shall act independently of the land commissioner and the estimators, and shall make his report in writing to the governor.

The governor is hereby authorized to pay such agent out of his contingent fund.

Whenever any member of the board of timber commissioners shall be satisfied, prior to the issuance of a permit, that by reason of any fraud or misstatement on the part of any estimator, or of any witness, or of any state officer, or by reason of any combination or irregularity, the interests of the state demand it, he is hereby authorized and required to withdraw his approval of such sale by stating the fact of the withdrawal of such approval in writing upon the margin of the record of said estimate and appraisal over his official signature.

SEC. 20. In case any sale of such timber is made by fraud or mistake, or contrary to the provisions of the statute, the same shall be void, and the permit issued thereon shall be of no effect, and the holder of such permit shall be required to surrender the same.

SEC. 21. No timber on such land shall be sold except to the highest bidder at public auction. All sales shall be held at the capitol building in the city of Saint Paul.

The land commissioner shall give notice of each and every sale by publishing a notice thereof in the following form in a daily newspaper printed and published at the city of Saint Paul, once in each week for five (5) successive weeks, the first publication to be made at least fifty-six (56) days before the date of sale.

NOTICE OF SALE OF STUMPAGE ON STATE
LANDS.

Notice is hereby given that I will offer at public auction at the state capitol in Saint Paul, on..... the.....day of....., at..... o'clock in the.....noon, certain timber belonging to the state and liable to waste.

An official copy of the list of lands upon which said timber is situated will be furnished by me to any and all applicants on and after the.....day of..... Said list will be published in the paper once a week for three successive weeks prior to said sale.

Dated Saint Paul, Minn., this.....day of
....., A. D.

.....,

Commissioner of the state land office.

At least thirty (30) days prior to the date of said sale a list of lands upon which the timber so to be

sold is situated, shall be compiled by the land commissioner, and thereafter shall be published in connection with the notice of sale, and a statement that it is the list referred to in said notice, once a week for three (3) successive weeks prior to the day of said sale, in a daily newspaper printed and published at Saint Paul.

A copy of said list, together with said notice and statement, shall be conspicuously posted in the office of the county auditor in each county in which any lands therein described, are situated, at least fifteen (15) days prior to the date of such sale. In case such county has no auditor, the said list shall be so posted in the office of the county auditor of the county to which the county in which said lands are situated is attached for judicial purposes. Said list shall contain a description of the tract of land upon which each and every parcel of timber to be offered at such sale, is situated, together with a statement of the quantity of timber thereon, as shown by the official estimate. No description shall be added to said list after the date of its compilation, and no timber shall be sold from any tract of land not contained in said list. *Provided*, that the state land commissioner may sell at public auction at the county seat to the highest bidder for cash, the stumpage on tracts of pine land not exceeding one section in area, where such stumpage does not exceed one hundred thousand feet on any one section; the whole of the purchase money to be paid at the time of the sale; and for the sale of such stumpage the notice shall be printed and published

once in each week for three consecutive weeks in a newspaper published in the county in which such pine stumpage is located and if there is no newspaper published in the county, then in a newspaper published in an adjoining county and all pine stumpage so sold shall be estimated and appraised as provided in section eleven (11) of this act, and shall be subject to all the restrictions and conditions hereinbefore provided.

The land commissioner shall furnish a copy of such list to each and every applicant.

SEC. 22. There shall be but one sale of such timber each year and the same shall be held not later than the fifteenth (15th) day of November, and may be adjourned by the commissioner from day to day (but no longer) until the sale is finished;

Provided, however, that in case of emergency, if said board of timber commissioners shall deem it for the best interests of said state that a second sale shall take place before the expiration of twelve months from the date of the first sale in any year, and they shall unanimously, decide, and recommend in writing, that such second sale is for the best interests of said state, the same shall be held by the commissioner under the conditions and regulations, so far as practicable, as herein provided for the regular sales, except that the notice containing the description of the land shall state that said sale is to be held pursuant to the recommendation of said board of commissioners and shall be published at least once a week for three successive weeks next

prior to the date of sale. The minimum price of any timber sold at any such sale shall be the appraised value thereof, as fixed by the estimate and approved by the board of commissioners as hereinbefore provided.

SEC. 23. At the time of making his bid for the purchase of any timber sold under the provisions of this act, the purchaser shall pay to the state treasurer twenty-five per cent of the appraised value of the timber sold, and the treasurer shall issue duplicate receipts therefor, one of which shall be delivered to the purchaser, and the other filed in the office of the land commissioner. Thereupon the land commissioner shall issue to such purchaser a permit in such form as may be prescribed by the attorney general, by the terms of which said purchaser shall be authorized and empowered to enter upon and cut and remove from the land therein described, the timber sold, according to the provisions of this act. Said permit shall be signed and sealed by the land commissioner and by the purchaser. It shall contain a description of the land upon which the timber is situated, a statement of the amount of timber estimated to be upon the same, the estimated value thereof, the price at which it is sold, or the price per thousand feet for which the same was sold, in case it is of such a character as to be sold by the thousand feet, and the bark mark which shall be placed upon the timber taken from said land. A separate and distinct bark mark shall be used on the timber cut under each permit; and in

case the permit shall cover a period of more than one season, it shall specify the mark to be used each season; and the same bark mark shall not be used for more than one season. No more than one section or the fractional part thereof, according to the government survey shall be described in any one permit. Said permit shall also provide that every piece of timber cut upon the land therein described shall have in addition to the bark mark hereinbefore provided for, the stamp mark MIN plainly placed upon the end thereof, and it shall contain the provision that in case of the failure of the purchaser to place both said bark mark and stamp mark upon each and every piece of timber cut under and by virtue of said permit, the state shall have the right to seize and take possession of any timber which the purchaser has failed to so mark wherever the same may be found. Said permit shall be dated as of its true date, and shall state the time of its expiration, and that it cannot be extended except as provided in section twenty-four (24). It shall contain such other and further provisions as may be requisite and necessary to secure to the state the title to all the timber cut under and by virtue of its provisions wherever the same may be found, until the same shall be fully paid for, and until the provisions of the permit shall have been complied with in all respects by the purchaser; it shall provide that all the timber standing upon the land described and sold by its terms to the purchaser, shall be cut; that the same shall be cut clean, acre by acre, without waste or damage to other timber; and

it shall contain the stipulation that the purchaser or his assignee, if any, shall and will notify in writing the surveyor general of logs and lumber for the district in which the land therein described is situated, and also the said land commissioner, at least fifteen (15) days before any cutting is done, at which time said purchaser, or his assignee, if any, intends to begin cutting thereunder, and shall again notify such officers and each of them in writing at least fifteen (15) days before any timber is removed from said land, of the date at which said purchaser, or his assignee, if any, intends to commence such removal. (Said permit shall also provide that the purchaser shall pay the state the permit price for all the timber which he fails to cut and remove.)

SEC. 24. No permit shall be issued to cover more than two logging seasons. The timber shall be cut and removed within the time prescribed by such permit. No permit shall be extended except by unanimous consent of the board of timber commissioners, and under no circumstances shall an extension be granted for more than one year, and then only for good and sufficient reasons. In case an extension is granted a log mark shall be agreed upon for the third season. Each permit shall be assignable, but all assignments must be in writing and signed, sealed and acknowledged by the assignor before they shall be valid or in any manner operative. They shall also be filed in the office of the land commissioner, and he shall endorse thereon his approval of the assignment, in case he approves it, and the

same together with the approval shall be recorded in a book to be provided for that purpose. In case he fails to approve it such assignment shall be void. Before any assignment shall be of any effect whatsoever, and before the land commissioner shall approve the same, the assignee shall give a bond to be approved by said commissioner by endorsement thereon, and in the same form and subject to the same terms and conditions as the original bond given prior to the issuance of the permit; but neither the original purchaser or either of his sureties, shall be in any manner released or discharged from liability by reason of the fact that an assignment has been made and a new bond given and said original bond shall remain of full force and effect until all provisions of the permit shall have been fully complied with, anything herein contained to the contrary notwithstanding. No permit shall be issued to any person, firm or corporation, other than the one in whose name the purchase is made at the time of such sale. Each permit shall be recorded in the office of the surveyor general of logs and lumber for the district in which the land described in the permit is situated; and the marks in such permit designated and described shall vest the ownership of all timber bearing the same in the state. Any permit which fails to contain any of the requirements provided for in this section shall be void on its face. In case any purchaser fails to pay the amount required to be paid at the time his bid is made, said commissioner may again immediately offer said timber for sale, but no bid shall be receiv-

ed from the person so failing to pay as aforesaid.

SEC. 25. Every person, firm or corporation purchasing timber at any such sale, before the execution of the permit hereinbefore provided for, shall sign, seal, acknowledge and deliver to the state, a bond with at least two sureties, in double the amount of the value of the timber included in the permit, as shown by the amount bid, and the official estimate as to quantity. Said bond shall be conditional upon the complete and faithful performance of all and singular the covenants and agreements in said permit contained, the requirements of law in respect to such sales, and the payment to the state treasurer of any amount that may be found due according to the terms of such permit, or by law. Each surety on such bond shall justify in double the amount thereof. The bond herein provided for shall be approved by the land commissioner in writing filed in his office, and recorded in a book to be kept for that purpose. No member of any firm or corporation which is the purchaser of the timber covered by the permit, the faithful performance of which such bond is given to secure, shall be accepted as surety thereon.

SEC. 26. In case the purchaser at any such sale, or his assignee, if any, fails or neglects to cut and remove the timber, or any part thereof, purchased by him, prior to the time when the permit issued on the sale thereof, expires, he shall, nevertheless, pay the state the permit price for all the timber which he fails to cut and remove, but under no cir-

circumstances shall he cut or remove said timber, or any part thereof, after the expiration of such permit. The sureties on the bonds given at the time of the purchase, or the assignment, if any, of the permit issued on such sale shall be liable therefor.

SEC. 27. The surveyor general of logs and lumber in each district shall scale all timber cut on state lands in his district, and make a detailed report thereof to the land commissioner on or before the fifteenth (15) day of May in each year. Such report shall show the name of the party cutting, the name of the party for whom the cutting was done, and the name of the party hauling the same, the kind and character of the timber cut, and the number of logs or pieces cut, the bark marks and stamp marks used thereon, and the total number of feet. Such report shall give the description of the land upon which the timber referred to therein was cut, and no other, and shall state the true and correct amount cut thereon. In no instance and under no circumstances shall timber cut on different sections be reported together. Such report shall also state specifically whether such timber has been cut according to the provisions of the permit, whether the land has been cut clean acre by acre, as far as the cutting has been made, whether the cutting has been done without unnecessary waste, or damage; whether the timber has all been cut, and if not, how much has been left standing, and whether all timber cut has been scaled and reported; whether the bark marks and stamp marks stipulated in the

permit have been placed upon each and every log cut from said land, and whether the stamp mark MIN has been plainly stamped on each and every piece of timber.

It shall also be the duty of the surveyor general of logs and lumber, for each district to report to the land commissioner all trespass which may be hereafter committed upon land belonging to the state, and said commissioner shall thereupon immediately cause such report to be investigated and if found true he shall cause such trespass to be estimated, scaled and appraised, and report the same to the attorney general for prosecution. All scaling shall be done by the surveyor general upon the land from which the timber is cut, instead of on the bank as has been heretofore the custom and each log so scaled shall be numbered consecutively, and the number of such log entered upon the minutes of the scaler.

Provided, however, that the land commissioner may question the sale of any number cut on state lands and scaled by any of the surveyor generals or their deputies, by serving a written notice on such surveyors general demanding a rescale. Such notice shall give a full and accurate description of the tract or tracts of land on which a rescale is demanded.

Upon securing such notice the surveyor shall appoint one of his deputies who shall act with one of the state land examiners appointed by the land commissioner to conduct such rescale. The said deputy surveyor general, and the said state land examiner

shall thereupon proceed to make a correct scale of all such timber cut and hauled, and removed, or remaining in the woods, or on skids, or standing, as the case may be, and whatever amount they shall agree upon shall be final and binding on the state and on the purchaser or purchasers, and a report made and signed by both the scalers above referred to shall be filed and recorded in the office of the land commissioner.

If it shall be found that the first scale as reported by the surveyor general was practically correct, then, the state shall pay such surveyor general the sum of five (\$5) dollars for each and every day necessarily spent in making such rescale in addition to all necessary expenses incurred in traveling to and from such tract or tracts of land, but in the case of a material difference in the two scalers, the surveyor general shall be entitled to no extra compensation for such rescaling. Scales made under this proviso may be what is known as a top and stump scale.

SEC. 28. Any surveyor general who shall fail to make full and complete reports in each and every instance, as herein provided, containing each and every requirement hereinbefore specified, including the statement of whether or not he has made his scale upon the land on which the timber was cut, who shall report timber cut from different sections in one report, who shall fail to scale the timber upon the land from which it has been cut, who shall neglect to report cases of trespass, as herein provided, who shall make any other or different scales than

as herein provided, who shall fail to scale all timber cut, who shall fail to comply with any and all of the provisions of this section, or who shall appoint in any other manner than as herein prescribed any deputy surveyor general who shall do work herein provided for, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not exceeding one thousand dollars, or by imprisonment in the county jail for a term not to exceed one year, or by both.

SEC. 29. The state shall pay the surveyor general for surveying timber cut on state lands when the same is scaled on the land from which it was cut, ten (10) cents per thousand feet on all timber cut and scaled under one permit up to five hundred thousand (500,000) feet in amount and five (5) cents per thousand feet on all timber cut and scaled under his permit which scales over five hundred thousand (500,000) feet.

Provided, however, that the purchaser or his assignee, if any, shall pay the state treasurer the amount of the fees of the surveyor general for such scaling, and the same shall be included in the drafts drawn by the state auditor as hereinbefore provided.

SEC. 30. No timber cut from such land shall be sold, transferred or manufactured until the amount due the state, according to the report of the surveyor general shall have been paid in full. Any person who shall sell, transfer or manufacture any timber cut from such lands before the amount due

the state therefor, according to such report, shall have been paid in full, or who shall cut any timber upon any such land and shall fail or neglect to mark or cause to be marked any such timber, as provided by the permit issued therefor, or shall place any other mark or marks upon the timber cut by him under such permit, than the ones prescribed thereby, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not exceeding one thousand (1,000) dollars and imprisonment in the county jail for a term not exceeding one year or by both.

SEC. 31. For the purpose of carrying out the provisions of this act, the surveyor general of logs and lumber for each district is hereby authorized and empowered to appoint as many deputy surveyors general as he may deem necessary.

Each of such deputies shall be a man of experience and capable of determining correctly the description of land from which any timber is being cut, according to the government survey thereof.

Each deputy shall take and subscribe an oath for the faithful performance of his duties and the protection of the interests of the state, and he shall give a bond in at least the sum of one thousand (1,000) dollars with two (2) sureties conditioned upon the proper and faithful discharge of his duties as such deputy. Said bond and the sureties thereon shall be approved by the surveyor general who appointed the deputy, and the same together with the oath shall be filed in the office of the land commissioner within thirty (30) days after the appointment is made.

Each deputy shall be appointed by instrument in writing, signed and sealed by the surveyor general who appoints him, and a duplicate copy of such appointment shall be filed by said surveyor general in the office of said land commissioner within ten (10) days after such appointment is made.

Any deputy may be discharged by the surveyor general who appointed him, at any time, and in case of his discharge, written notice of such discharge shall be given to the land commissioner immediately thereafter. No one in the employ of any person, firm or corporation transacting a lumbering or logging business shall be appointed as such deputy. No deputy shall be paid for his services or receive any remuneration or compensation whatsoever, either directly or indirectly, from any person, firm or corporation, which has cut or has received a permit to cut from state lands any timber scaled or to be scaled by him.

He shall receive the compensation for such services directly from the surveyor general and through his office, and in no other manner whatsoever.

SEC. 32. It shall be the duty of each deputy to assist the surveyor general of the district in which he is appointed in carrying out the provisions of this chapter in every manner faithfully and completely, so far as they relate, to the duties of his office.

Each deputy shall receive his instructions from and work under the immediate direction of the surveyor general in whose district he is appointed; he shall make his reports of all work done at such

times and in such manner as the surveyor general of the district in which he is appointed may direct.

Provided, always, that such reports shall conform in each and every respect to the provisions of this chapter, and shall contain all the information requisite and necessary to enable the surveyor general for whom the work is done to make his report to the commissioner of the land office, under, pursuant to and as required by this chapter.

SEC. 33. Any deputy surveyor general who shall fail, neglect or refuse to carry out any of the provisions of this act, or who shall accept an appointment as such deputy in any other manner than as herein prescribed, or who shall receive any compensation or remuneration for his services as such deputy or any gratuity of any kind, either directly or indirectly from any other person or source whatsoever than the surveyor general who has appointed him, or who shall fail to properly determine the description of any land from which any timber he may scale is cut, or who shall fail to report correct amount of timber, or the correct number of feet cut from any particular piece of land, according to the scale, as herein provided, together with all marks used thereon, both stamp marks and bark marks; or who shall fail, neglect or refuse to scale any timber upon the land where the same was cut or who shall fail, neglect or refuse to note the fact whether the MIN is stamped upon each and every piece of timber cut, and to embody the same in his report, or who shall fail, neglect or refuse to report the amount cut from any section or subdivision thereof in separate

amounts as herein provided, or who shall fail, neglect or refuse to inform himself as to the provisions and conditions of the permit under which the cutting was done, and to faithfully and honestly report whether such timber has been cut according to the provisions of such permit, or who shall fail, neglect or refuse to report each and every violation of the provisions of each and every such permit together with any trespass that may hereafter come to his attention or who shall fail to number consecutively the logs scaled by him as hereinbefore provided.

Shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding five hundred (500) dollars, or by imprisonment in the county jail for a term not exceeding six (6) months or by both.

SEC. 34. In case the land commissioner shall at any time be of the opinion that any deputy surveyor general is incompetent or is not acting for the best interests of the state in the performance of his duties, or that he has in any manner violated any of the provisions of this act, he shall lay the matter before the board of timber commissioners, and if said board shall decide by a majority vote thereof, that the opinion of said land commissioner is well founded, said board shall authorize and direct the land commissioner to recommend to the surveyor general who appointed such deputy that he be discharged, and upon such recommendation in writing said surveyor general shall forthwith discharge said deputy and notify said land commissioner in writ-

ing immediately, of the fact of such discharge, and such deputy shall not be reappointed.

SEC. 35. The land commissioner shall keep a general index of all instruments, documents, and papers filed or recorded in his office, showing the date of filing, and the book and page where the same are recorded.

All papers, letters, documents and instruments coming into his hands relating in any manner to such lands or to the timber thereon, shall be filed by him, and, together with copies of all letters written by him, shall be preserved as part of the records of his office.

He shall keep a stumpage record book, showing the number of the permit, its date, the date of its expiration, the bark and stump marks prescribed therein, the date of the sale of the timber covered thereby, the date of the approval of such sale, the description of the land on which the timber is located, the date of the estimate, the name of the estimator who made it, the amount, kind and value of the timber as shown by such estimate, the price for which the same was sold, the name of the purchaser, the amount of timber taken from the land, the date of the report of the same by the surveyor general, the amount paid, the date of payment, the marks used upon the timber and reported, the name of the deputy who scaled the timber, the date of the assignment of the permit, if any, the name of the assignee, if any, the date of filing the bond given at the time of the assignment, the amounts of the

bonds, the names of all sureties on the bonds accompanying the permit, the date of the record of such bonds, together with a specific reference to all correspondence in any manner relating to the description of the land covered by each permit.

The land commissioner shall keep a record of all sales of timber made by him, in a book to be provided for the purpose, and known as the sales book.

He shall enter in ink in such book at the time each tract of timber is sold and before selling another description, the name of the purchaser, the price to be paid, and a description of the land on which such timber is situated.

SEC. 36. Upon receipt of any report from the surveyor general of the amount of timber cut under any permit, the state auditor shall draw a sight draft on the purchaser named in the permit, or on his assignee, if any, as the case may be for the amount due by the terms of such permit for such timber; and at the same time shall place in the hands of the state treasurer a duplicate thereof.

Payment of such draft shall be made to the state treasurer, who shall give duplicate receipts therefor, and thereupon one of such duplicate receipts shall be filed in the office of the state auditor, and upon the filing thereof he shall execute under his hand and seal a bill of sale of the timber so paid for, and a transfer of the mark thereon, to such purchaser or his assignee. Such bill of sale and transfer shall describe the timber paid for, its quantity and character, and the land upon which the same is cut. It shall be recorded in the office of the land

commissioner in a book to be kept for that purpose, and also in the office of the surveyor general of the district in which such timber is cut.

In no event whatever shall such land commissioner execute any such bill of sale or transfer until the state has been fully paid for the timber therein described, including the fees of the surveyor general for scaling.

SEC. 37. If the party on whom such draft is drawn shall not pay the same immediately, it shall bear interest at the rate of eight (8) per cent per annum from its date, and if it is not paid within thirty (30) days from its date the state treasurer shall place the same in the hands of the attorney general for collection, and he shall proceed forthwith to collect the same.

Provided, however, that in case the land commissioner shall at any time deem it for the best interests of the state to take possession of the timber, for the payment of which such draft is drawn, he shall immediately proceed to seize said timber wherever the same may be found, and sell the same to the highest bidder at public auction. The proceeds of such sale shall be first applied to the payment of the expenses incurred by the commissioner in seizing said timber and making such sale; and the remainder shall be applied to the payment of such draft and interest.

In case a sufficient sum is not realized on the sale of such timber to pay such expenses and said draft in full, the balance remaining due on such draft

with interest, shall be collected by the attorney general as herein provided.

In case there shall be realized on such sale a sum more than sufficient to pay the expenses incurred by the land commissioner in making such seizure and sale, and paying said draft, the entire sum so realized shall belong to the state.

Provided, however, that neither the making of said draft, the payment thereof, the bringing suit thereon, the seizure of such timber or the sale thereof, as herein provided, shall in any manner be construed to release or discharge any surety upon any bond given pursuant to the terms of this act, anything herein contained to the contrary notwithstanding, nor to in any manner bar or estop the state from afterwards claiming that the timber for which said draft was given was cut or taken, or removed contrary to the law, and recovering for the same, in any civil action, or prosecuting the offender criminally under the provisions of this act, or both.

SEC. 38. The land commissioner is hereby authorized and empowered to compromise and settle any case of trespass upon such lands, whenever, in his judgment, it is for the best interests of the state to make such settlement; *provided*, however, that in no event shall he settle any case of trespass on such lands until he has had the timber taken under such trespass scaled and appraised by a state estimator, and the written report thereon made and filed in the office of said commissioner, as herein provided; and *provided further*, that he shall not make any

such settlement for an amount less than double the value of such timber, as shown by such scale and appraisal.

SEC. 39. It shall be the duty of the land commissioner to keep a record book which shall contain a record book which shall contain a record of all trespass reported, of all scales of trespass, of all correspondence relating thereto and of all settlements thereof.

SEC. 40. The land commissioner is hereby authorized and empowered to seize and take possession of any timber or other property wrongfully taken from such lands, wherever it may be found, and in the event of such seizure to sell such timber or other property to the highest bidder at public auction.

In case the state either by action or through the land commissioner, shall seize or take possession of any timber or other property taken from such lands, and shall proceed to sell the same, the expenses incurred in making such seizure and sale may be deducted from the proceeds thereof.

SEC. 41. The records kept in the office of the land commissioner, pursuant to this act, shall be taken and deemed notice of the facts therein set forth.

SEC. 42. The word "timber," as used in this act, shall be construed to mean trees, logs, ties, posts, poles, paving blocks, lumber, lath and shingles.

SEC. 43. Sections eight (8), nine (9), twelve (12), fifteen (15), sixteen (16), thirty-one (31),

forty-one (41), forty-two (42), forty-four (44), forty-seven (47), forty-eight (48), forty-nine (49), fifty (50), fifty-one (51), fifty-two (52), fifty-three (53), and fifty-four (54) of chapter thirty-eight (38), general statutes of eighteen hundred and seventy-eight (1878), any and all amendments thereto, and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

SEC. 44. This act shall take effect and be in force from and after June first (1st) 1895.

Approved April 22nd, 1895.

APPENDIX "B."

STATE V. SHEVLIN-CARPENTER CO.

(Supreme Court of Minnesota, Aug. 3, 1906.)

BROWN, J. This action was brought under the provisions of section 7, c. 163, p. 352, Gen. Laws 1895, to recover treble damages for an alleged willful trespass upon lands owned by the state by cutting and removing timber therefrom. Defendant interposed a general demurrer to the complaint, and from an order overruling it appealed to this court.

It is alleged in the complaint that at the time stated therein defendant, a corporation, willfully, wrongfully, and unlawfully, well knowing that the state was the owner thereof, entered upon certain school lands of the state and cut and removed therefrom 2,444,020 feet of timber of the value of \$17,108.14; that by reason of the fact that the act of defendant was willful it became and is liable, to the state for treble the value of the timber so cut and removed, and judgment was demanded accordingly. The statute under which the action was brought provides as follows: "Section 7. If any person, firm or corporation, without a valid and existing permit therefor, cuts or employs, or induces any other person, firm or corporation to cut, or assist in cutting any timber of whatsoever description, on state lands, or removes or carries away or employs, or induces or assists any other person, firm or corporation to remove or carry away any such timber, or other property, he shall be liable to the state in

treble damages, if such trespass is adjudged to have been willful; but double damages only in case the trespass is adjudged to have been casual and involuntary, and shall have no right whatsoever to any remuneration or allowance for labor or expenses incurred in removing such other property, cutting such timber, preparing the same for market, or transporting the same to or towards market. Whoever cuts or removes, or employs or induces any other person, firm or corporation to cut or remove any timber or other property from state lands, contrary to the provisions of this act, or without conforming in each and every respect thereto, shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding one thousand (1,000) dollars, or by imprisonment in the state prison not exceeding two (2) years, or by both in case the trespass is adjudged to have been willful."

The questions presented by defendant in support of the demurrer, which we deem entitled to special consideration, resolve themselves into four propositions, or contentions, namely: (1) That the statute, in imposing a double liability for a casual or involuntary trespass, is obnoxious to those provisions of the state and federal Constitutions which provide that no person shall be deprived of life, liberty, or property without due process of law. That in declaring the casual or involuntary trespass a crime, it violates sections 2 and 7 of article 1 of the state Constitution, as well as contravenes natural justice, and invades those natural rights, which, if not directly, are impliedly, secured by the Consti-

tution, or are protected by the fundamental principles of the social compact and exist independent of constitutional guaranty. (2) That in so far as it provides for the recovery of double or treble damages in a civil action, it contravenes section 7, art. 1, of the state Constitution, which provides, among other things, that no person shall be put twice in jeopardy of punishment for the same offense. (3) That the damages given by the statute, being in the nature of a penalty, can be recovered only by way of indictment and criminal prosecutions. (4) That the subject of the statute is insufficiently stated in its title.

1. Counsel for the state suggest that the first contention of defendant above mentioned is not involved in the case, for the reason that the action was not brought to recover double damages, but under the treble damage feature of the statute, and based upon allegations that the trespass and acts of defendant complained of were willful and unlawful. But this view of the case is not tenable. The statute was intended to establish a definite measure of damages in all cases of trespass upon state lands, and to that end treble damages are provided for a willful, and double damages for a casual or involuntary, trespass, thus wholly abrogating the rules of the common law in such cases. It is true that the action is founded upon an alleged willful trespass; but if the state should fail to prove the allegation of willfulness, and the trespass should, on the trial, turn out to have been casual or involuntary, recovery could undoubtedly be had for the amount

fixed by the statute for a trespass of that nature, viz: double damages. If, as in all probability will be the case, the main issue in the litigation should be the alleged willfulness on the part of defendant, the latter would be entitled to an instruction to the jury that, in the event the state failed to prove the affirmative of that issue by a fair preponderance of the evidence, treble damages could not be given; and coupled therewith the court would be required to say that the failure of proof on that issue would not deprive the state of the right to a verdict for damages under the next and only other rule applicable to the case. So that defendant is in position to insist that the statute is invalid, so far as it imposes a penalty in the way of double damages for a casual or involuntary act of trespass. 5 Ency. Pl. & Prac. 729: Starkweather v. Quigley, 7 Hun (N. Y.) 29; Sprague v. Irwin, 27 How. Prac. 51; Du Bois v. Beaver, 25 N. Y. 123, 82 Am. Dec. 326; Clark v. Field, 42 Mich. 342, 4 N. W. 19; Rhemke v. Clinton, 2 Utah, 230.

The first subject for consideration is the construction of the statute. If susceptible of a construction to the effect that there was no intention on the part of the Legislature to declare the casual or involuntary trespass a crime, one feature of defendant's position would be eliminated, and it is important to ascertain the intention of the statute in this respect. The first paragraph of the section treats of the civil remedy. It provides that if any person, firm, or corporation, without a valid and existing permit issued in accordance with other pro-

visions of the statute, cuts, or induces any other person to cut or assist in cutting, any timber of any description upon any state land, or removes or carries the same away, or employs or induces another to do so, he shall be liable to the state in treble damages, if the trespass is adjudged to have been willful, but double damages where it is adjudged to have been casual or involuntary. The second paragraph deals with the subject from the penal standpoint, and declares that any person who shall cut or carry away such timber, or assist another in such an act, contrary to the provisions of the preceding paragraph, shall be guilty of a felony and punished by a fine not exceeding \$1,000, or by imprisonment in the state prison for a period of not more than one year, or by both fine and imprisonment where the trespass is adjudged to have been willful. The statute contains remedial and penal features, and as respects the former is entitled to a liberal construction, but as to the latter must be strictly construed. Sutherland on Statutory Construction, 337, 532. Remedial statutes are generally treated with considerable liberality and are construed in the light of what was demanded or required of the lawmakers, the evils intended to be guarded against, and the particular wrongs to be remedied. Words are often omitted, or supplied by implication, and sentences transformed, to render the statute a consistent whole and effectuate the legislative will; and this, too, in construing penal, as well as remedial, statutes, though many of the courts hold that the strict letter of a penal statute must control as against the

state. But, after all has been said in generalizing upon the rules of construction, they all converge to the same point and bring up at the ultimate inquiry, the intention of the Legislature.

By taking into consideration well-known facts leading up to the adoption of the statute in question, no difficulty is experienced in discovering the legislative will in this instance. The state is possessed of large tracts of timber lands of incalculable value, upon which designing persons have persistently trespassed, cutting and removing therefrom valuable pine timber. The state, through its officials, has been confronted with difficulties in detecting the guilty parties and bringing them to justice, and has been defrauded and robbed of large sums of money by their acts. It finally was thought necessary to enact a very stringent law to prevent future trespassers, and the drastic statute under consideration was the result. The statute exacts from the casual or involuntary trespasser double damages, and also declares his act a felony. The language of paragraph 2 will admit of no other view. It provides that any person who shall cut or remove timber from any lands of the state, contrary to the provisions of the statute, shall be guilty of a felony, and punished as there prescribed. No exception is found exempting the casual or involuntary trespasser from the penalty. That it was intended he should be criminally punished, in addition to the payment of double damages, is made certain by that clause of the section which provides for both fine and imprisonment where the trespass is adjudged

willful. While courts, in construing statutes of this kind, where the language employed is broad and comprehensive enough to cover both willful and involuntary acts, restricts the recovery of double or treble damages to cases of willful trespass (*McDonald v. Montana Wood Co.*, 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616; *Kramer v. Goodlander*, 98 Pa. 353; *State v. Baker*, 47 Miss. 88; *Cohn v. Neeves*, 40 Wis. 393), the statute under consideration is too explicit to admit of that rule, and we construe it, in harmony with its plain, unambiguous language, to impose upon the casual trespasser criminal punishment, as well as double damages.

As so construed, is it obnoxious to constitutional principles? We think not. The gist of the objection to the statute is that it punishes a person for an act which might, under some circumstances, be the result of a simple mistake, an act innocent in itself and committed with no evil purpose or intent. This, however seemingly meritorious at first thought, is without force. One of the exclusive provinces of the legislative department of government is to declare what acts or omissions shall constitute a crime, to define the same, and provide such punishment therefore as may be deemed appropriate; and unless the constitutional rights of the citizen be invaded, its determination in all such matters is conclusive upon the courts. The Legislature may declare that a willful trespass upon the lands of another shall constitute a criminal offense and fix the limits of punishment therefor, either by fine or imprisonment, or by compensating the

injured party in damages to be recovered in a civil action, or by both, as its judgment may dictate. Legislative provision for double or treble damages in such cases is sustained by many of the courts in this country, 12 Am. & Eng. Ency. Law, 8 et seq.; *Brown v. Evans* (C. C.) 8 Sawy. (U. S.) 488, 17 Fed. 912; *Smith v. Bagwell*, 19 Fla. 117, 45 Am. Rep. 12; *Hendrickson v. Kingsbury*, 21 Iowa, 380; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Mayer v. Frobe*, 40 W. Va. 246, 22 S. E. 58; *Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463; *Boetcher v. Staples*, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295; 13 Cyc. 118, and cases cited. Although there may be a limit beyond which the Legislature may not go, either in declaring what acts shall constitute a crime or in imposing an arbitrary rule of damages in excess of actual compensation, whether that limitation be found in those inherent rights reserved to the people by section 15 of article 1 of our state Constitution, or in those inalienable rights mentioned in the Declaration of Independence, or in those ingrafted upon the Constitution by implication through the process of construction by the courts (62 Cent. L. J. 144; 6 Columbia L. Rev. 69), we are clear that the authority of the lawmaking body was not exceeded in this instance in extending the rule of the cases above cited to the casual and involuntary trespass. An evil intent is ordinarily an essential element in all criminal prosecutions, but it may be dispensed with in particular cases by the Legislature.

The act under consideration, in so far as it im-

poses a criminal punishment or double damages for the casual or involuntary trespass, dispenses with the necessity of proving a malicious or other wrongful purpose and the pivotal question is whether the Legislature could, within constitutional restrictions, so enact. The law on this subject is correctly summed up in *Clark & Marshall's Law of Crimes*, as follows: "Public policy may require the Legislature, in prohibiting and punishing particular acts under certain circumstances, to provide expressly or impliedly, that any person who shall do the act shall do it at his peril, and that he shall not be allowed to escape punishment by showing that he acted in good faith, without negligence, and in ignorance of the existence of the circumstances rendering the act unlawful. If the language and subject-matter of the statute show clearly that this was the intention of the Legislature, the courts must give it effect, however harshly the statute may seem to operate in the particular instance." The principle of law thus laid down is supported by an almost unanimous line of authorities both in this country and in England. *Commonwealth v. Wentworth*, 118 Mass. 441; *Regina v. Woodrow*, 15 Mees. & W. 404; *Halsted v. State*, 41 N. J. Law, 552, 32 Am. Rep. 247; *Commonwealth v. Connelly*, 163 Mass. 539, 40 N. E. 862; *Commonwealth v. Murphy*, 165 Mass. 66, 42 N. E. 504, 30 L. R. A. 734, 52 Am. St. Rep. 496; *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163; *State v. Smith*, 10 R. I. 258; *State v. Huff*, 89 Me. 525, 36 Atl. 1000; *State v. Zichfeld*, 23 Nev. 304, 46 Pac. 802, 34 L. R. A. 784, 62 Am. St. Rep.

800; *People v. Waldvogel*, 49 Mich. 337, 13 N. W. 620; *People v. Roby*, 52 Mich. 577, 18 N. W. 365, 50 Am. Rep. 270; *State v. Presnell*, 34 N. C. 103.

We have already referred to the conditions existing in the state which prompted the Legislature to enact this law—the fact that the lands of the state were being stripped of their value by willful and reckless trespassers, and the great difficulty experienced by its officials in bringing guilty parties to justice under statutes which imposed a penalty only where the trespass was willful. In these conditions the Legislature deemed the property rights of the state would be best protected by dispensing in the future with the question of evil intent, casting upon the individual the burden of determining at his peril the boundary lines of land from which he takes and removes standing pine. Within the principle of law to which we have just alluded, such legislation is sanctioned by sound public policy and is valid. A similar statute, but far less explicit than the one under consideration, was sustained by the Supreme Court of South Dakota in *State v. Dorman*, 9 S. D. 528, 70 N. W. 848. A recent decision of the Supreme Court of Michigan is also directly in point. *People v. Christian*, 107 N. W. 919. The statute under consideration in that case provided that every person, not lawfully authorized, who should himself enter upon, or induce or direct any other person to enter upon, lands owned by the state and cut and remove timber therefrom should be guilty of a felony and punished by imprisonment in the state's prison for a term not exceeding two years,

or by a fine not exceeding \$500 or by both fine and imprisonment. That statute was amendatory of a prior statute which provided for punishment only where the trespass was willful, and the court held the statute valid, saying that it was as competent for the Legislature to make an act of trespass criminal, as it was to make the opening of a saloon a criminal act. It appears from the opinion in that case that trespasses upon public lands, as in this state, had become notorious; that the state had been defrauded of thousands of dollars worth of valuable timber, and the court remarked that it had no difficulty in reaching the conclusion that the Legislature not only intended to eliminate the question of evil intent, but possessed the power to so enact. The act under consideration is analogous to statutes prohibiting the sale of liquor to minors, in construing which the courts uniformly hold that the honest belief of the person making the sale that the minor was of age is no defense; and to statutes prohibiting the sale of adulterated foods, where it is held that persons selling articles of food must know at their peril whether they are adulterated. It is no defense in such cases that the retail dealer procured the articles from a manufacturer and disposed of them under the belief that they were pure and unadulterated. Statutes imposing double damages for animals killed or injured by railroad trains in consequence of a failure on the part of the company to fence its right of way are also analogous (*Railway Co. v. Humes*, 115 U. S. 513, 6 Sup. Ct. 110, 29 L. Ed. 463; Cyc. 1073); or for double costs in

such cases (*Schimmele v. Ry. Co.*, 34 Minn. 216, 25 N. W. 347). And, too, statutes providing double damages for injuries done by vicious dogs, killing or injuring sheep or cattle, without regard to whether the owner of the dog knew of his vicious propensities. Statutes dispensing with the necessity of proving a scienter in such cases are sustained. 2 Am. & Eng. Ency. Law, 372-374; *Trompen v. Verhage*, 54 Mich. 304, 20 N. W. 53; *Newton v. Gordon*, 72 Mich. 642, 40 N. W. 921; *Kerr v. O'Connor*, 63 Pa. 341; *Chickering v. Lord*, 67 N. H. 555, 32 Atl. 73. Other similar legislation, founded in an exercise of the police power or justified by public policy, might be referred to; but it is unnecessary. The authorities cited justify the conclusion that the statute under consideration, in imposing a criminal punishment for the casual and involuntary trespass, is within the limits of constitutional restrictions and valid. And if valid in that respect, it follows, a fortiori, that it was within the power of the Legislature to award double damages for the same wrong. In so dispensing with the wrongful intent, the Legislature violated no constitutional right of the citizen, and the statute must be enforced.

2. It is also contended that the statute, as respects double and treble damages, violates section 7 of article 1 of the state Constitution, which provides that no person shall be twice put in jeopardy of punishment for the same offense. This proposition is founded upon the theory that double or treble damages are in the nature of a penalty, or

as punishment for the wrong for which they are imposed, and that to sustain the statute would result in twice punishing the wrongdoer; at least, that he would be in jeopardy of a second punishment, if such damages were recovered in this action. Defendant is probably a little premature in raising the point. It might come with some force if presented in a criminal prosecution after recovery in a civil action. But we do not dispose of the question upon this ground. Upon its merits the courts are not in entire harmony, though we regard it as settled in this state by the decision in *Boetcher v. Staples*, 27 Minn. 308, 7 N. W. 263, 38 Am. Rep. 295. The court in that case said: "The rule, according to the great mass of authorities, applies as well where the wrongful acts of defendant bring him within the law for punishing crimes as where they are less aggravated in character." The authorities on the subject are collected and discussed in 2 *Sutherland on Damages*, §§ 390-396. That the awarding of exemplary damages in an action for a tort, although punishable as a criminal offense, is not a violation of the constitutional provision that no person shall be twice put in jeopardy for the same offense, is affirmed by the great majority of the courts. 13 Cyc. 118; 12 Am. & Eng. Ency. Law, 8-10, and cases cited. Nor does it deprive the citizen of his property without due process of law. *Ry. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463. The provisions of the Constitution referred to apply to criminal prosecutions only. 12 Am. & Eng. Ency. Law, 8, and cases cited.

Counsel for appellant recognize that the rule on this subject is settled in this state, as between individuals, but they earnestly contend that the rule laid down in *Boetcher v. Staples*, *supra*, should not be applied in an action brought by the state; that to sustain the right of the state to exemplary damages, and its further right to prosecute and punish defendant under the criminal provisions of the statute, would violate both the letter and the spirit of the Constitution. It is insisted that exemplary damages are awarded in a measure to gratify the feelings of the aggrieved party; that the state has no such feelings, no vengeance or avarice: that it punishes the guilty in the interests of society, and not to add to its revenue. This is plausible, but not tenable. Whatever, in legal contemplation, exemplary damages may be, whether properly termed aggravated relief, or a penalty pure and simple, they are not imposed in the sense of or as a substitute for criminal punishment, but rather as enlarged damages for a civil wrong. No sound reason occurs to us why the state in preservation of the property intrusted to it for the use and benefit of the people, should not be granted all remedies that are afforded and extended individuals in the protection of their property and property rights. Indeed, potent reasons might be suggested for granting the state special privileges in this respect. Its property, particularly school lands, is located in remote parts of the state, and it is without adequate facilities for guarding and protecting the same from trespassers. Its lands have been denuded of val-

nable timber year after year, and the school fund of the state has thus been greatly depleted. If the legislative department is without power to extend to it the rights possessed and granted the individual, the equal protection of the law in its property rights would be denied it. Statutes tempered in moderation as to penalty have proven in the past ineffectual, and unless the stringent features of the present statute are sustained in all respects, trespasses will continue in the future with impunity. No injustice can possibly result from requiring persons to ascertain the boundaries of lands owned by them, and we do violence to no inherent right of the citizen in sustaining a statute the purpose of which was to impose that duty upon them.

3. Counsel for defendant also contend that the damages awarded by the statute, being in the nature of a penalty, can be recovered only by way of indictment and criminal prosecution; that the state cannot maintain a civil action to recover the same. We do not concur in this contention. We deem it unnecessary to extend the opinion by its discussion. Respecting the right of the state to maintain a civil action to recover exemplary damages, we entertain no serious doubt; in matters involving its proprietary or business functions, the state occupies the same position in the courts as private suitors. 26 Am. & Eng. Ency. Law, 485.

4. The further contention that the statute is invalid in that the subject thereof is not sufficiently expressed in its title is not well taken. The title of the act is, "An act regulating state lands and the

product of the same, and to repeal certain acts and parts of acts." Though the title is not so expressive as it might have been made, the constitutional requirement is substantially complied with. The statute made the subject-matter of the title is a practical revision of prior statutes and contains numerous conditions and provisions regulating and controlling the sale, leasing, or other disposition of state land. The title does not come within the objection that it was employed as a cloak for inappropriate legislation, but answers the purpose intended by the framers of the Constitution which was not to require the subject-matter of proposed legislation to be expressed fully and explicitly in the title, but to prevent such enactments as chapter 24, p. 73, Laws 1855, where, under the title, "An act to incorporate the Root River Valley Railroad Company," the Legislature incorporated the railroad company, located the county seat of Fillmore county, declared the county of Wright duly organized, and provided for the appointment of certain officers therein.

This covers all questions, discussed in the briefs, which we deem entitled to special reference, and for the reason stated the order of the trial court overruling the demurrer to the complaint is affirmed.

APPENDIX "C."

STATE V. SHEVLIN-CARPENTER CO.

(Supreme Court of Minnesota. Nov. 1, 1907.)

LEWIS, J. Action by the state for the purpose of recovering treble damages from appellant for the willful and unlawful cutting and removing from state lands of 2,444,020 feet of timber. Appellant answered, and admitted the cutting and removal of the timber, justified the same under a sale and permit to J. F. Irwin, its representative, denied that the timber was cut and removed willfully and unlawfully, alleged payment in full, and specially pleaded the unconstitutionality of chapter 163, p. 349, of the General Laws of 1895, under which the state seeks to recover. On a former appeal, upon demurrer to the complaint (*State v. Shevlin-Carpenter Company*, 99 Minn. 158, 108 N. W. 935), the constitutional questions were raised, and it was there held that the act was constitutional, and that in case of trespass the state might recover either the double value of the property taken, or treble its value, according to whether the facts constituted a casual or involuntary, or a willful and unlawful, trespass. We adhere to that decision, and for the reasons set forth in the opinion then filed.

Upon trial on the merits, the trial court found that on November 14, 1900, the state sold to John F. Irwin, appellant's representative, the pine timber involved in this action for the agreed price of \$7 per 1,000 feet, board measure; that on Novem-

ber 14, 1900, permit No. 358-B was issued to Mr. Irwin by the land commissioner, authorizing him to cut and remove the timber so purchased during the logging seasons of 1900, 1901, and 1902; that the permit expired June 1, 1902, and was extended to June 1, 1903; that at the time the permit was issued appellant company paid into the state treasury the sum of \$1,370, being 25 per cent. of the appraised value of the timber sold, as provided by section 23, c. 163, p. 360, Laws 1895; that in the winter of 1903-04, and after the extension above mentioned had expired, appellant company willfully and unlawfully cut and removed the timber in question; that after the timber was cut the surveyor general duly scaled and returned the amount of the timber so cut and removed to the land commissioner, who thereupon computed the total amount due to be \$18,514.39; that a draft was drawn on Mr. Irwin for that amount, which included the surveyor general's scaling fees of \$147.20, and interest on the purchase price at the rate of 8 per cent for one year; that the draft was duly paid; that the state received and still retains the amount. The court also found that the value of the timber taken was \$6 per thousand feet, board measure, and that the single value thereof was \$14,664.12, but ordered judgment to be entered for treble that amount, less a credit of \$16,997.19, and judgment was accordingly entered for the sum of \$26,995.17.

There are two questions before the court: (1) Did appellant make out its defense that the timber was lawfully cut and removed, and was paid for in

full? (2) If the evidence fails to sustain that position, and warrants the conclusion that the timber was cut and removed without authority of law, then was it taken under such circumstances as to warrant the state in recovering as for a willful and unlawful trespass, or was the act of cutting and removing the timber of such a character as to bring it within the provisions of the statute, viz., a casual or involuntary trespass?

1. Under the provisions of section 11, c. 163, p. 354, Laws 1895, the state land commissioner is authorized to sell the pine timber of the state when the same is liable to waste, and not otherwise; and it is provided that when a sale of timber is made the commissioner shall execute a permit to enter upon the land for the purpose of cutting and removing it, and before any permit shall be granted the timber shall be estimated and appraised. The act provides that the commissioners of appraisement shall be appointed by the land commissioner, and there are elaborate provisions regulating the estimators and the method of scaling the timber. By section 18 (page 357) a timber commission is established, consisting of the land commissioner, the Governor, and the State Treasurer, and it is made the duty of that commission to determine whether or not any timber belonging to the state is subject to sale, and the board shall determine whether a sale is for the best interests of the state and necessary in order to protect the state from loss. Section 23 covers the question of permits, and the land commissioner is authorized to issue a permit in

such form as the Attorney General of the state may prescribe, authorizing the purchaser of timber to enter upon and cut and remove the same from the land. The permit is issued, signed, and sealed by the commissioner. The act provides that the permit shall be dated as of its true date, and shall state the time of its expiration, and that it cannot be extended, except as provided in section 24 of the act, which provides that no permit shall cover more than two logging seasons, and that no permit shall be extended, except by the unanimous consent of the board of timber commissioners, and under no circumstances shall an extension be granted for more than one year, and then only for good and sufficient reasons. The permit involved in this case, as already stated, was issued November 14, 1900, and expired June 1, 1902. It bears the indorsement of an extension until June 1, 1903, on account of winter breaking up so early, and was signed by all the members of the timber commission.

Mr. Clarke, a witness on behalf of appellant, testified that he was informed by one of appellant's clerks that there were some permits for the cutting and removing of timber which were expiring and needed to be looked after; that he took the same and called on the State Auditor and handed him the permits; that the Auditor said he thought there would be no trouble about getting two of them extended, as they had run but two years, but that the third—the one in question—would have to come before the state timber board; that there were a number of permits in the same shape, and they

would have to be passed upon by the state timber board as to extension; that word was received later at the Shevlin-Carpenter Company's office that the timber board had passed on the extension, and that appellant was allowed to go on and cut the timber by paying the amount stated in the permit, with an additional 8 per cent. per annum for one year from the time of the extension; that accordingly appellant went on and cut the timber in the ordinary course of business, the surveyor's scale showing the amount cut; that the State Auditor made draft on appellant for the amount, plus interest and scaling charges, less the amount paid in, some \$1,350; that appellant paid the sum to the State Treasurer and received his receipt therefor. The witness further testified that appellant acted in good faith, believing it had a perfect right under the permit to cut and remove the timber.

The State Auditor was called as a witness, admitted that he had a conversation in his office with Mr. Clarke regarding the permit in question, and testified: "Mr. Clarke called in connection—to inquire about the condition of this permit which he had, one of them being the one in question, and stated that they had been unable to cut it during the life of that permit, and he wanted to know what could be done with it. I explained to Mr. Clarke that under the law I had no authority to grant that extension; but I called his attention, however, to what had taken place regarding some other permits which were similarly situated, that they were about to expire, or had expired, and that the timber

board, consisting of the Governor, State Treasurer, and the State Auditor, had heard the statement of the parties interested and had practically consented to permit them to cut that timber the succeeding year on condition that they would pay 8 per cent interest. * * * And I stated to Mr. Clarke that inasmuch as he appeared to have as good a reason for asking it as they had, we should treat him just the same as we had agreed to treat the others; * * * and whether or not that was afterwards submitted to the timber board I am not clear, and I won't be able to state positively. But it seems quite reasonable that at some later time I did call that matter to the attention of the timber board, and stated to them that there were other permits similarly situated to the ones that had been acted upon specifically by the board, and there were others besides Mr. Clarke's, and I stated that I thought we would have to treat all alike. We would not give a concession to one and refuse it to another." The witness also stated that he had made an examination of the files of the office for records of the meeting of the timber commission, but found none prior to January 1, 1901, and had no personal recollection whether or not a meeting had taken place with respect to this permit. On cross-examination the state's counsel asked the Auditor the following questions: "Q. And at that time you knew it was beyond the power of yourself as State Auditor, also beyond the power of the timber board of which you were a member, to extend that permit any further, did you not? A. I did. Q. And you told Mr.

Clarke that fact, did you not? A. That is my recollection of it; yes, sir." On re-direct examination Mr. Clarke testified that there was nothing said about the lack of power to extend the permit. That portion of section 24 which confers authority to make a second extension reads as follows: "No permit shall be extended except by unanimous consent of the board of timber commission, and under no circumstances shall an extension be granted for more than one year, and then only for good and sufficient reasons. In case an extension is granted a log mark shall be agreed upon for the third season."

Appellant submits that the authority to make an extension is not necessarily limited to the period of one year, and that, when considered in connection with the entire act, the language fairly means that other extensions can be made, but only for one year at a time. The argument on this point is based on the evident purpose of the entire act, viz: to protect the timber lands of the state from waste, and that the same are to be sold only at public sale after an appraisalment. It is argued that when a permit is about to expire, if nothing is to be accomplished by having another public sale, then there is no reason why an additional extension for another year might not be granted, so as to allow the timber to be removed under the original sale. We are unable to accept this interpretation of the statute. To our mind it is clear that it was the intention to limit the power of the timber commission to one extension of one year only; the result in such

case being that, if the timber is not cut and removed within the additional year, the state must begin de novo, and have a new appraisement and public sale.

It is further claimed that, conceding the second extension was invalid for want of authority under the law to grant it, yet the state officers, having construed the act to the contrary and having assumed to proceed within their legal rights, having permitted appellant to go upon the land and cut and remove the timber, having caused the timber to be scaled, and having received the amount of the value according to the scale and purchase price, together with 8 per cent. interest during the year of extension, the state is estopped from denying the validity of the transaction, and should not be permitted to recover even the double value in damages. Conceding that appellant and its representatives were acting in good faith, we are satisfied that under the circumstances of this case appellant is not in a position to urge that defense. Estoppels against the state are not favored, and do not arise from the negligence of its officers, since those who deal with an officer of the state are bound to know the extent of his power and authority. *Filor v. U. S.*, 9 Wall. (U. S.) 45, 19 L. Ed. 549; *Pulaski County v. State*, 42 Ark. 118; *Salem Imp. Co. v. McCourt*, 26 Or. 93, 41 Pac. 1105; *State ex rel. Lott v. Brewer*, 64 Ala. 287. However, in the second proviso of section 37 of the act in question it is declared that the state shall not be estopped to recover the value of its timber by the acts of its officers in receiving payment therefor. By this language the Legislature intend-

ed to remove any doubt upon the question of estoppel when timber is taken contrary to law. Although the parties are mistaken as to their rights and proceed in good faith, honesty of purpose cannot constitute a complete defense where the taking is unlawful. The provisions of chapter 163, pp. 349-371, Laws 1895, are plain upon this subject, and the parties are bound to know the law.

2. As already stated, appellant proceeded to cut and remove the timber in the same manner as if an actual legal extension had been granted; that is to say, appellant openly went on the land and did the cutting, immediately notified the proper officers, and the scaling was made, the estimate thereof sent to the State Auditor, a bill of the proper amount rendered, with 8 per cent. interest added, and a draft drawn on appellant's representative, Mr. Irwin, in whose name the permit was issued, which was paid to the state, and the money retained by it. It is clear that the State Auditor and State Treasurer proceeded in good faith and acted upon the theory that an extension of the permit had been granted, and that appellant was authorized to cut and remove the timber under and by virtue of such extension. The proper officer was notified to scale the logs in pursuance of such understanding, and the bill was made out in the Auditor's office. The draft itself upon its face indicates that it was pursuant to the authority conferred by permit No. 358-B, and the Treasurer's receipt for the money refers to the particular draft drawn by the Auditor. The state takes the position that this evidence justified

the trial court in finding that the trespass was willful; that appellant was bound to know the law, and must take the utmost penalty for violation thereof. Is this position equitable and sound? A decision of this question does not depend altogether on the strict legal rights of the parties as to the title of the timber cut and removed. We are dealing here with the question of intention and good faith. The representations made to appellant's representative were equivalent to informing him that, unless advised to the contrary, he might consider that the application to extend the permit was granted. In view of these admissions, although the Auditor stated his own want of power, he could not at the same time have stated to Mr. Clarke that such extension could not legally be granted by the timber commission; for the two statements are absolutely contradictory and cannot be reconciled. The Auditor, as land commissioner, conducted the negotiations upon the theory that the timber commission possessed such authority, and said that such extensions had been granted to others similarly situated, and that they would treat this particular permit in the same manner. This is admitted, and, if true, then there was no occasion for making the declaration that the board was without authority to act. Although the witness made an affirmative answer to the question asked by the state's counsel on cross-examination, we must assume that such answer was made inadvertently.

The state's position rests upon the assumption that a party commits willful trespass simply be-

cause he is charged with knowledge of the law; but, where the question of intention enters into the essence of the offense, the presumption that the act was willfully performed may be rebutted, and the burden is upon appellant to affirmatively show that it was not guilty of intentional wrongdoing. *Karsen v. M. & St. P. Ry. Co.*, 29 Minn. 12, 11 N. W. 122. The act in question very wisely makes a distinction between trespasses committed involuntarily and those committed willfully. The definition of "casual and involuntary" should not be restricted. The words are intended, as used in chapter 163, to convey the idea that, when an illegal cutting of state timber lacks the elements of willfulness and intention, then the damage shall be double the value only. One who, through mistake or inadvertence, passes beyond his own boundary line and cuts and carries away timber of another, is not guilty of willful trespass. *Batchelder v. Kelly*, 10 N. H. 436, 34 Am. Dec. 174. "Willful," in the present case, is not determined by the mere fact that appellant knowingly and purposely entered upon the land in question and cut and removed the state's timber therefrom. Of course, its action in that respect was the result of a fixed purpose so to do. To determine what is meant by "willful," we must ascertain the purpose with which the act was performed. Did appellant intend to commit a wrong against the state, and to appropriate the timber without regard to the rights of the state? In the case of *United States v. Homestake Mining Co.*, 117 Fed. 481, 54 C. C. A. 303, defendant justified the trespass upon

the ground that it had been informed by the Secretary of the Interior that certain timber might be taken from the forest reserve land until further notified. It turned out that, although no authority was conferred for the taking of the timber, the court held that the parties acted in good faith in relying on such promise. The court pertinently remarked that, if the presumption that a party was charged with knowledge of the law made every trespasser a willful and intentional wrongdoer, then there never would be a trespasser through inadvertence or mistake, or one who violates the law in the honest belief that he is acting within his legal rights. In the case of *King v. Merriam*, 38 Minn. 47, 35 N. W. 570, it was held that in an action for the value of timber cut and carried away from the land of another, if defendant was an unintentional and mistaken trespasser, or honestly and reasonably believed that his conduct was rightful, the measure of damages was the value of the timber at the time it was taken. In *State v. Shevlin-Carpenter Company*, 62 Minn. 99, 64 N. W. 81, timber was cut and removed under a void permit; but it was held proper, nevertheless, to determine whether the trespass was willful or in good faith, in arriving at the proper basis of damages in a replevin action. That case would seem to be good authority for the rule that an illegal taking of the state timber is not necessarily a willful trespass.

The record of this case forces one of two conclusions: Either both parties, appellant and the representatives of the state, were acting in good

faith, or appellant, knowing better, purposely took advantage of the state, and deliberately, willfully, and fraudulently cut the timber. Such willful and fraudulent purpose cannot reasonably be inferred from appellant's conduct, and is not justified under the evidence by the mere fact that its officers and representatives were charged with knowledge of the law. The finding of the trial court that appellant was guilty of a willful trespass is not sustained by the evidence. On the contrary, the record conclusively shows that appellant had reasonable ground for believing authority had been granted, and honestly acted on such belief.

The court found that the amount of timber taken by appellant was 2,444,020 feet, and that its value was \$6 per 1,000 feet, board measure, making a total of \$14,664.12. Being of opinion that, in this action, the state is limited to a recovery of double damages, and the timber cut having been paid for, the judgment is necessarily limited to the value as found.

Remanded, with directions to reduce the amount of the judgment to \$14,664.12. In all other respects, the judgment is affirmed.

START, C. J. I dissent. The controlling question in this case is one of fact, namely: Did the defendant willfully cut and remove the timber in question? The trial court found as a fact that they did so cut and remove the timber. The majority opinion holds "that it conclusively appears that the trespass was inadvertently committed in good faith, upon the supposition that authority of the state had been granted." If this be true, then the finding of the

learned trial judge was made without any evidence whatsoever to support it. It is not a question of the preponderance of the evidence, but whether the record discloses any evidence fairly tending to support the finding. The conclusion which I draw from the record is that the evidence not only supports the finding within the rule, but that it is difficult to see how the trial judge, upon the evidence, could come to any other conclusion than the one reached by him. In considering the question whether the evidence supports the finding, we must assume that the representative of the defendant was informed by the State Auditor to the effect that neither he nor the timber board had any power to extend the permit; for the credibility of the witnesses was a question for the trial judge, and his memorandum shows that he accepted the testimony of the Auditor as true. It was not necessary to make a special finding of such evidentiary fact, for only the ultimate facts found are to be stated in the findings.

The permit under which the defendant attempts to excuse its acts expressly provided that there could be no extension of the time limit of the permit, except as provided in section 24, c. 163, p. 362, Gen. Laws 1895, which, in language so terse and so clear that no intelligent man could fail to understand it, forbade the extension of the permit, under any circumstances, for more than one year, and then only for good and sufficient reasons. It is an admitted fact in this case that there was one extension of this permit, which had expired before the trespass was committed. We have, then, a case

where the defendant's permit, and the statute therein referred to, showed on its face that it could not then be extended under any circumstances, and, further, that the defendant was told by the State Auditor that no state official or board had any power to extend the permit; and yet, with knowledge that the permit had expired and that the law forbade its renewal, the defendant deliberately went upon the land of the state and cut and carried away its timber thereon. Defendant seeks to mitigate this act, and to establish that the trespass was not willful, within the meaning of the statute, by evidence tending to show that the state officers having charge of its public lands had granted extensions of permits for a longer time than one year to other parties; that they permitted the defendant to go upon the land and cut and remove the timber, caused it to be scaled, and received from the defendant the purchase price therefor, with interest, during the year for which they understood the permit had been extended. If this were a case between private parties the facts which such evidence tends to prove could be invoked as an estoppel against any claim of damages for a willful trespass. They are, however, of no avail against the state. The evidence in this case, tending to show either a violation of the law or a lax enforcement of it by public officers, does not, in my opinion, establish the good faith of the defendant in the premises.

STATE V. SHEVLIN-CARPENTER CO.
et al.

(Supreme Court of Minnesota. Jan. 24, 1908.)

On reargument. Affirmed.

PER CURIAM: This case having been reargued and fully considered, the former decision is adhered to.

ELLIOTT, J. I am of the opinion that the former decision should be adhered to, and merely add the statement that the case rests upon its own particular facts. It is not held that the State Auditor or timber board can expressly or by implication waive the rights of the state or protect a trespasser from the penalty imposed by the statute.

START, C. J., dissents.

BROWN, J. I concur in the dissent of the Chief Justice. It is clear to me, in view of the express statutory restrictions upon the subject involved in this case, that neither the State Auditor nor the state timber board had authority expressly to waive the rights of the state, and, if they could not do so by affirmative action, a fortiori their silent acquiescence in the commission of or settlement for other trespasses by defendant or others would furnish defendant no protection for the trespass here complained of. The rights and liabilities of the parties are clearly and specifically defined by statute, by which the court is controlled.

The judgment should be affirmed.

Office Supreme Court U. S.

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JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 139.

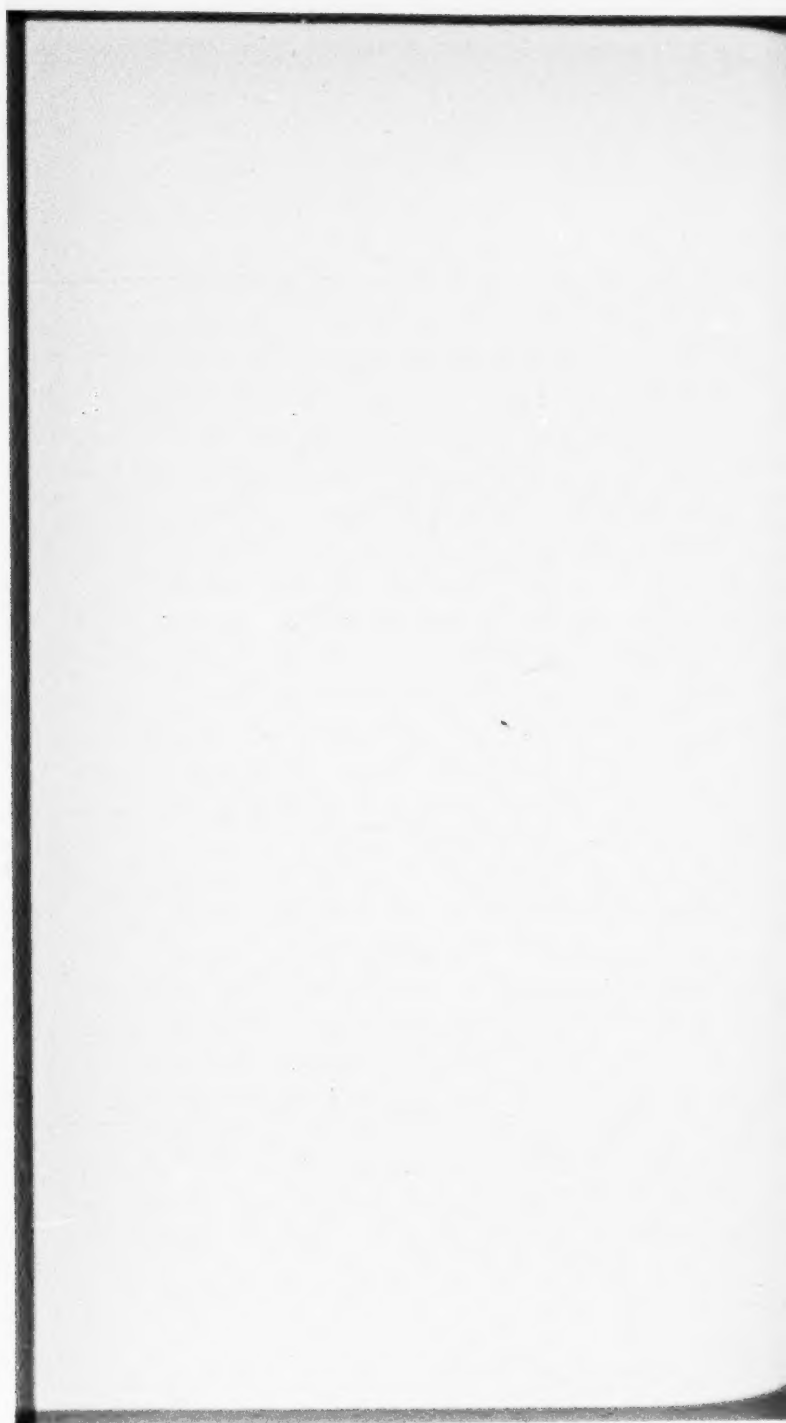
**SHEVLIN-CARPENTER COMPANY AND JOHN F.
IRWIN, PLAINTIFFS IN ERROR,**

vs.

STATE OF MINNESOTA, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

**FRANK B. KELLOGG,
NEWEL H. CLAPP,
R. J. POWELL,**
For Plaintiffs in Error.



SUPREME COURT OF THE UNITED STATES.

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SHEVLIN-CARPENTER COMPANY AND JOHN F.
IRWIN, PLAINTIFFS IN ERROR,

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STATE OF MINNESOTA, DEFENDANT IN ERROR.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

I.

It is urged here that this court had no jurisdiction because:

(a) The Federal questions here presented do not appear by this record to have been "considered" by the Supreme Court of Minnesota, and,

(b) Because plaintiffs in error, having failed to take a writ of error from the judgment of the State Court sustaining the demurrer to the complaint, they have "acquiesced" in that judgment and cannot now raise these questions.

Perhaps the first proposition might have had some merit at the time the brief for the State was written, because the record in this court did not, *then*, show what assignments of error

were made in the State Court either on the appeal from the order overruling the demurrer or from the judgment on the merits, and just what "constitutional questions" the court refers to in the opening paragraph of its opinion on the last appeal may not be clear, although we think taking the record as it then stood it clearly appeared that the only "constitutional questions" that could have been raised were those pleaded in the answer (Record, p. 10) and preserved by exception taken on the trial (Record, p. 18). But as the record is now amended, it is very clear that the objections to the statute urged here have been insisted upon from the beginning, and the right of plaintiff in error to contend for them carefully preserved.

We cannot see how counsel can say that the State Court did not "consider" the constitutional questions raised. The court says (Record, p. 42):

"On a former appeal, upon demurrer to the complaint, *State v. Shevlin-Carpenter Company*, 99 Minn., 158, the constitutional questions were raised, and it was there held that the act was constitutional and that in case of trespass the State might recover either the double value of the property taken, or treble its value, according to whether the facts constituted a casual or involuntary, or a wilful and unlawful trespass. *We adhere to that decision*, and for the reasons set forth in the opinion then filed."

How the court could "adhere to" the former decision without "considering" the questions raised it is difficult to see. But if the court simply applied its rule that a question once decided by it in a cause is "the law of the case," still it has had presented to it and "considered" fully the questions here presented and it cannot matter when in the progress of the cause such "consideration" took place.

As to the second proposition, it is submitted that no writ of error could have been sued out against the judgment sustaining the demurrer, because that judgment was not final (*Meagher vs. Minnesota Thresher Mfg. Co.*, 145 U. S., 608).

Hence the first opportunity plaintiffs in error have had to present these questions to this court was after the judgment of the Supreme Court of the State, to reverse which the present writ of error was sued out.

II.

The learned counsel for the State insist,

First, that because the State has seen fit to enforce but one of the penalties provided by the statute, therefore the plaintiffs in error are not "in the class" which might complain of *prosecuted* for both penalties.

Second, that this is especially true *now*, because the statute of limitations has run against the second prosecution.

They cite, in support of their first proposition,

Seaboard Air Line Co. vs. Seegard, 207 U. S., 73.

Hatch vs. Reardon, 204 U. S., 152.

Lee vs. New Jersey, 207 U. S., 67.

None of these cases are like or analogous to the case at bar. In *Seaboard Air Line Co. vs. Seegard* the offense complained of was a violation of the statute as to *intrastate* business only; the defendant was not and could not, *for that offense*, be subject to prosecution under that part of the statute which applied to *interstate* business. In *Hatch vs. Reardon*, in order to argue the questions raised as to the constitutionality of the act there under consideration, cases had to be imagined. In *Lee vs. New Jersey* the same state of things existed. In neither of these cases was the defendant being prosecuted for *the very offense* which it might be urged was unconstitutionally created.

In the case at bar no exercise of the imagination is necessary in order to point out the iniquity of the statute. Not only these plaintiffs in error, but any and every other person who becomes liable to prosecution under it, becomes liable to double prosecution the moment he cuts a tree on

State land; the only "classes" there are are "willful" and "casual and involuntary" trespassers; and the only difference between these "classes" is the extent to which their pockets may be emptied by the prosecution for what is called in the statute "damages." Both classes may not only be compelled to pay a fine by way of "damages" but may also be fined and imprisoned; *and as to the latter penalty, there is no difference, so far as the statute is concerned, in the amount of penalty to be inflicted on either "class."*

As to the second proposition, it amounts to this: Today a man is liable to prosecution for both penalties; that would render the statute unconstitutional; an action is commenced to recover the so-called damages before the statute of limitations has run; before the case comes on to be heard the statutory period within which the second prosecution must be commenced expires, and therefore the statute has become constitutional. The bare statement of the proposition seems to us to refute it.

But there is a further point to be kept in mind in this connection, and that is, first, the absence of any record from which this court is compelled to infer that no criminal prosecution has been commenced; and, second, the absence of any showing that the right of the State to proceed criminally has been barred by a statute of Minnesota. All the statements relating to this phase of the subject, contained in the State's brief, rest wholly upon the mere assertions of counsel. But lawsuits of this character are and must be determined upon the facts and conditions as they existed at the time the issue was joined. If both of these remedies existed then, and the law was for that reason unconstitutional and void, it is so now.

The State urges further that, if this law is held unconstitutional, it will be left without protection until the next Legislature convenes (State's brief, p. 42). The absurdity of this plea will appear from an examination of the existing legislation on this subject. In the first place, the entire chapter involved in this litigation was repealed by the Re-

vised Laws of Minnesota, chapter 108, section 5541. The provisions of section 7 of that law (section 7, chapter 163, Laws of Minn., 1895) were substantially continued in the Revised Laws of 1905, section 2442, the important change being the omission of the provision in section 7, Laws 1895, making the "casual and involuntary" trespasser a felon. Chapter 204, Laws of 1905, section 1, is the present law on the subject, and supersedes the Code provisions above referred to (by virtue of section 5504, Revised Laws of 1905). In this act the provisions of section 7, Laws of 1895, making a casual or involuntary trespass a felony, are omitted. Consequently the determination by this court that section 7, Laws of Minn., 1895, was and is unconstitutional would not affect the State in the least, except to prevent it, in the case at bar, from enforcing what, under the circumstances, every one must concede is a monstrously unjust and unfair penalty.

Respectfully submitted.

FRANK B. KELLOGG,
NEWEL H. CLAPP,
R. J. POWELL,
For Plaintiffs in Error.